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## Women's Rights are Human Rights Redux: Ain't I A Human?

Ann Piccard

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## ARTICLES

### WOMEN'S RIGHTS ARE HUMAN RIGHTS REDUX: AIN'T I A HUMAN?<sup>1</sup>

ANN PICCARD<sup>2</sup>

"As an American, I want to speak up for women in my own country, women who are raising children on the minimum wage, women who can't afford health care or child care, women whose lives are threatened by violence, including violence in their own homes."<sup>3</sup>

Over fifteen years ago, then—First Lady Hillary Rodham Clinton asked the world to acknowledge that women's rights are human rights.<sup>4</sup> In the United States, that notion has yet to gain widespread acceptance. It is time

<sup>1</sup> The quote attributed to the slave Sojourner Truth, in 1851, represents the fact that women who were slaves received no accommodations or protections based on their gender; society's concerns about protecting "womanhood" never acknowledged women slaves as women – they were slaves, nothing more. See DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 18 (W.W. Norton & Co. 1999) (1985); Angela Mae Kupenda, *Political Invisibility of Black Women: Still Suspect But No Suspect Class*, 50 WASHBURN L. J. 109, 112 (2010).

<sup>2</sup> Prof. of Legal Skills, Stetson University College of Law. I am deeply grateful to the organizers of and participants in the AALS 2011 Mid-Year Workshop on Women Rethinking Equality, and especially to Prof. Martha Davis of the Northeastern University School of Law, for enabling me to present this article as a work in progress; the value of that experience cannot be overstated. I also appreciate the opportunity to present this article to the Stetson University College of Law faculty as a work in progress, thanks to the efforts of Dean Jamie Fox. And I thank my dear friends Dr. Ella Schmidt and Lucia Stavig for answering my questions about anthropology, culture, sociology, and, specifically, the study of subalternity.

<sup>3</sup> Hillary Rodham Clinton, First Lady of the United States, Remarks to the United Nations Fourth World Conference on Women (Sept. 5, 1995), available at [www.americanrhetoric.com/speeches/hillaryclintonbeijingspeech.htm](http://www.americanrhetoric.com/speeches/hillaryclintonbeijingspeech.htm). For an in-depth, first-person account of events leading up to and occurring during the Beijing Conference, see ARVONNE FRASER, *SHE'S NO LADY: POLITICS, FAMILY, AND INTERNATIONAL FEMINISM* (2007).

<sup>4</sup> Clinton, *supra* note 3. Her words were: "human rights are women's rights and women's rights are human rights." In 1996, the Brooklyn Journal of International Law devoted its symposium issue to the subject "women's rights are human rights." Rhonda Copelon, *Introduction: Bringing Beijing Home*, 21 BROOK. J. INT'L. L. 599, 599 (1996). The Beijing Conference at which the then-First Lady spoke garnered a great deal of attention at the time, and in the years immediately following, but as the decades pass there are fewer references in the literature to the notion of women's rights as human rights, and especially of human rights as women's rights. The goal has not been reached, and most scholars and human rights advocates continue to press for the United States to join the many human rights treaties to which it is not a party.

again for human rights advocates to speak up for the women, and for all the other people in this country, who live in poverty, fear, or insecurity. Despite the progress that has been made, many women in the U.S. still struggle for meaningful equality;<sup>5</sup> if nothing else, we work more hours, earn less money, and hold fewer positions of power than men. In order for women in the U.S. to make real progress, it is time to move away from the notion that women's rights are somehow different from other humans' rights; intersectionality, rather than essentialism, is the better approach to the entire subject of women's rights as human rights.<sup>6</sup>

Women's rights advocates in the U.S. have pushed unsuccessfully for this nation to ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>7</sup> In light of the Senate's persistent refusal to ratify that treaty,<sup>8</sup> and the Executive's ongoing reluctance to consider prioritizing ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>9</sup> it may be time to consider instead that the International Covenant on Civil and Political Rights (ICCPR),<sup>10</sup> to which the United States is already a party, is a good tool for making women's rights, finally, human rights. Domestic enforcement of the ICCPR through litigation will have its limitations, however, and therefore it might behoove those who fight for equality to

<sup>5</sup> See Berta Esperanza Hernandez-Truyol, *Out of the Shadows: Traversing the Imaginary of Sameness, Difference, and Relationalism – A Human Rights Proposal*, 17 WIS. WOMEN'S L.J. 111, 116 (2002) ("The United Nations, no bastion of sex equality, has acknowledged women's subordinated status in the home and at work, in society and in government, at church and at school, regardless of where in the world they are located. This inequality is social, political, and economic. Global equality has been, and continues to be, an elusive goal.")

<sup>6</sup> An accessible and enlightening analysis of the notion of intersectionality can be found at Richard Delgado, *Rodrigo's Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247 (May 2011). It is particularly illustrative that Professor Delgado writes from the perspective of a man of color who identifies himself as a minority in the overwhelmingly white world of law school faculty. Acceptance of the notion of intersectionality is generally credited to Kimberle' Crenshaw in her article *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1242 (1991) ("The problem with identity politics is not that it fails to transcend difference, as some critics charge, but rather the opposite – that it frequently conflates or ignores intragroup differences. In the context of violence against women, this elision of difference in identity politics is problematic, fundamentally because the violence that many women experience is often shaped by other dimensions of their identities, such as race and class.")

<sup>7</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]. The so-called Women's Treaty explicitly requires states parties to take all measures necessary to ensure that women and men are treated equally.

<sup>8</sup> See *infra* notes 27-28 for further discussion of the underlying reasons for the United States' general reluctance to enter into human rights treaties.

<sup>9</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter ICESCR].

<sup>10</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. This treaty came into force for the United States on September 8, 1992. See RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 261 (3d ed. 1995).

look more closely at other models, specifically at the use of Truth and Reconciliation Commissions, to renew the necessary and meaningful conversation about sex, race and class inequality in this country. Rethinking equality should involve thinking beyond the traditional adversarial framework of rights and remedies and examining the possibility of using a Truth and Reconciliation Commission model to initiate the dialogue that is necessary to make equality a reality for women and others in the U.S.

The barriers that continue to keep women from reaching equality in this country will not be removed solely by the enactment or enforcement of more law. In the United States today, women are equal to men in almost every way – at least according to the written law they are.<sup>11</sup> Women's daily reality may not always reflect that rule of law, but this article proposes that, at the end of the day, law reform and litigation are no longer the best or the only roads to equality for women in the U.S.<sup>12</sup> Instead, a true acceptance of women's rights as human rights will require conversations that allow a shift in social norms<sup>13</sup> and a cultural internalization of the international norms

<sup>11</sup> Notable exceptions to legal equality persist in the U.S. selective service law, 50 U.S.C. § 453(a) (2011) (women would not be subject to the draft if it were reinstated and are not required to register with the Selective Service System) and immigration law, 8 U.S.C. § 1409 (2011) (nationality of children born out of wedlock is determined by the father's nationality rather than the mother's unless the mother is a U.S. national who lived in the U.S. for at least one year). It is jarring to read these federal laws and see their explicit focus on sex, which is so rare in U.S. laws these days. In most areas of the law, successful litigation arising from sex discrimination has been based on violations of state and federal statutes such as the Fair Labor Standards Act, the Family and Medical Leave Act, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and the Equal Opportunity in Education Act to name a few. U.S. voters have never ratified an Equal Rights Amendment to the Constitution, but litigants have nevertheless been successful in establishing that de jure discrimination against women is dead in the U.S. As Catherine MacKinnon has noted, the equal protection clause of the U.S. Constitution has been applied and interpreted to prohibit discrimination based on sex, and "distinctions may be based on sex only if supported by an exceedingly persuasive justification in pursuit of extremely important governmental objectives." Catharine A. MacKinnon, *Newark and the History of Women and the Law: A Love Letter to Ruth Bader Ginsburg*, 31 WOMEN'S RTS. L. REP. 177, 178 (2010) [hereinafter MacKinnon, *A Love Letter to Ruth Bader Ginsburg*].

<sup>12</sup> For an excellent history of the women's law reform movement, see Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 NEV. L.J. 580 (2009). The notion of intersectionality was demonstrated by the Nineteenth century activists (so-called first-wave feminists) who fought not just for women's right to vote, but also for the rights of victims of domestic violence (whether women or children), for men and women members of racial minorities, and for workers of both sexes. *Id.* at 581.

<sup>13</sup> For one of many discussions of social movements, see my earlier article Ann M. Piccard, *U.S. Ratification of CEDAW: From Bad to Worse?*, 28 LAW & INEQ. 119, 155 (2010) (proposing that "discrimination against women will end, when it does, as a result of social change rather than of legal reform" and that "even a relatively disenfranchised minority can bring about social change in ways that are more meaningful than the failed successes so frequently wrought by strictly legal reforms.") [hereinafter Piccard, *U.S. Ratification of CEDAW*]. See also MacKinnon, *A Love Letter to Ruth Bader Ginsburg*, *supra* note 11, at 180 ("[O]ften barriers to women's equality do not exist as 'sex classifications' in the sense that existing equality law has been prepared to recognize, but as systemic or structural rules or norms where sex is not mentioned anywhere.") This need for cultural change, rather than the law, is what stands in the way of equality for women in the U.S. today.

that guarantee equality to every human being rather than just a privileged few.<sup>14</sup>

Research shows that customs of international human rights law develop the same force and effect as treaties and covenants and may, over time, become threads woven into the fabric of a nation's culture.<sup>15</sup> This is truly the best hope for women in the United States who continue to face the reality of discrimination every day. This is also a struggle that women share with many other identifiable groups: poor and racial minorities come immediately to mind as do other groups such as the elderly, the physically and mentally disabled,<sup>16</sup> religious minorities, immigrants,<sup>17</sup> and, these days, even public employees such as teachers, police, firefighters, and nurses.<sup>18</sup> Fulfillment of the promises made in the ICCPR, however it is accomplished, would address the obstacles faced by all of these groups, and national compliance with this Convention would eliminate the need for the typical resort to identity politics<sup>19</sup> in the struggle for human rights in the

<sup>14</sup> Since at least 1948, UN member states (including the U.S.) have acknowledged that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Universal Declaration of Human Rights, G.A. Res. 217 (III) A, pmbl., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml>.

<sup>15</sup> See Oona A. Hathaway, *Do Human Rights Treaties Make A Difference?*, 111 YALE L.J. 1935 (2002) for the proposition that enactment of human rights treaties may actually precede a lowering of the signing state's human rights record. But see HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 72 (2000) which describes customary international law as "a means of universalising [sic] public interest: the behaviour of states acts as an indicator of the degree to which they are interested in achieving a particular legal outcome."

<sup>16</sup> See, e.g., Wendy F. Hensel & Leslie E. Wolf, *Playing God: The Legality of Plans Denying Scarce Resources to People with Disabilities in Public Health Emergencies*, 63 U. FLA. L. REV. 719, 721, 770 n.3 (2011) (citing Sharon Hoffman, *Preparing for Disaster: Protecting the Most Vulnerable in Emergencies*, 42 U.C. DAVIS L. REV. 1491, 1494 (2009)) (explaining that "[t]he infirm elderly, poor, and disabled were the most likely to die" after Hurricane Katrina).

<sup>17</sup> Religion and national origin are, of course, protected classes under the United States Constitution, but pleading and proving discrimination on such grounds is inevitably difficult, as illustrated by *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (dismissing plaintiff's claim of a government-sponsored plan to discriminate against Muslims following the attacks of Sept. 11, 2001).

<sup>18</sup> These vital public servants are increasingly coming under attack from Republican-dominated legislatures that seek to remove benefits ranging from tenure to pensions to the fundamental right to bargain collectively. See, e.g., Mark Niquette, *Public Worker Protests Spread From Wisconsin to Ohio*, BLOOMBERG, Feb. 18, 2011, <http://www.bloomberg.com/news/2011-02-17/public-employee-union-protests-spread-from-wisconsin-to-ohio.html> (last visited Nov. 17, 2011) (discussing the protests that followed Wisconsin' and Ohio's legislative revocation of public employees' right to bargain collectively). This is not a "women's" problem, even if many public school teachers are women; firefighters, police, and state employees are all equally affected by the current move to strip them of their rights and benefits. Therefore, the efforts to eliminate rights and benefits for public servants demonstrate the notion of intersectionality: a schoolteacher may be a woman or a man, a Christian or a Muslim, white or Latina. Regardless of identity, that teacher will be adversely affected by the elimination of rights and benefits.

<sup>19</sup> See generally MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW* (1997) (providing a thorough analysis of identity politics). The notion encompasses the idea of group identity as the individual's defining characteristic. *Id.*

U.S. But again, even if the ICCPR becomes domestically enforceable in the United States, which it currently is not, this should be viewed as only one piece of the equation used to solve the problems of inequality; women's rights advocates and others should look beyond the rhetoric of rights and responsibilities for remedies to the pervasive prejudice that makes such laws necessary. It is, indeed, time for women in this country to re-think equality so that the notion of women's rights as human rights might at last become a reality.

This article proposes that regardless of whether the U.S. Senate ever enacts implementing legislation for the ICCPR (or any other human rights treaty for that matter), and even regardless of whether the principles of the ICCPR have attained the status of customary international law, Truth and Reconciliation Commissions based on existing international human rights norms make more sense than litigation as the next step on the path toward equality for women, minorities, and the poor in this country. Part One of this article recaps the development and current status in the U.S. of the Convention on the Elimination of All Forms of Discrimination against Women, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, and discusses the human rights addressed in those documents.<sup>20</sup> Part Two questions whether the ICCPR has attained the status of customary international law, and, if so, whether there is any genuine need for implementing legislation in the U.S.<sup>21</sup> This part also examines whether the notion of civil and political rights reflected in the ICCPR could reasonably be interpreted to encompass women's rights and economic and social rights as well.<sup>22</sup> Part Three proposes that equality will become reality in the U.S. only when the notion of human rights for all becomes a part of our nation's culture. Truth and Reconciliation Commissions are one path by which this goal might be approached and the U.S. should employ this model to address the deploring lack of civil, political, economic, social, and cultural rights in this affluent, developed, Western nation with its vast resources and diverse population of citizens.<sup>23</sup> Part Four of this article addresses the question, for feminist legal scholars in particular,<sup>24</sup> of whether the best

<sup>20</sup> See *infra* notes 25-38 and accompanying text.

<sup>21</sup> See *infra* notes 59-106 and accompanying text.

<sup>22</sup> *Id.*

<sup>23</sup> See *infra* notes 107-152 and accompanying text.

<sup>24</sup> Feminist legal scholars, by definition, view the law through a "gendered lens"; this article suggests that it may be time to widen the aperture on that lens to include issues of race and class as well as gender.

course of action lies not in more legislation or litigation but in accepting that we are all humans, regardless of sex or any other “identity.”<sup>25</sup> Finally, this article concludes that it is time for the entire nation, not just women, to re-think equality.

## I. THE U.S., CEDAW, ICESCR AND THE ICCPR<sup>26</sup>

The United States has a track record with human rights agreements that can be described as dubious, at best,<sup>27</sup> and stands in poor company in its refusal to join either CEDAW or ICESCR.<sup>28</sup> The vast majority of U.N. Member States are parties to these conventions and both were signed by President Jimmy Carter in 1977. There is no discernable progress in this country toward ratifying either of these Conventions,<sup>29</sup> so on a very practical level they are currently of limited use in any struggle for equality in the U.S.<sup>30</sup>

<sup>25</sup> See *infra* notes 152-193 and accompanying text; see also His Holiness the Fourteenth Dalai Lama, *Daily Peace Quote*, LIVING COMPASSION.ORG (June 15, 2011); His Holiness the Fourteenth Dalai Lama, *Beyond “Us” and “Them”*, SHAMBALA SUN, May 2011, at 49, available at [http://shambhalasun.com/index.php?option=com\\_content&task=view&id=3682&Itemid=0](http://shambhalasun.com/index.php?option=com_content&task=view&id=3682&Itemid=0) (“Our usual concept of ‘us’ and ‘them’ is outdated. In its place, we need an attitude that sees all human beings as our brothers and sisters, that considers others to be part of ‘us.’”).

<sup>26</sup> Two of these three Covenants, the ICESCR and the ICCPR, are considered, along with the Universal Declaration of Human Rights, to comprise what is known as the “international bill of rights.” Louis Henkin, *Preface to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, at ix (Louis Henkin ed., 1981) (describing the origins of the term “international bill of rights” as having been “born during the Second World War and projected to be part of the new postwar world order,” and defining the term as “the ensemble of comprehensive instruments developed under the aegis of the United Nations pursuant to the human rights provisions of the UN Charter, namely, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and its protocol, and the International Covenant on Economic, Social, and Cultural Rights.”). I include CEDAW for the purposes of this article, not because it is a part of the International Bill of Rights but because it is an identity-specific human rights instrument designed to eliminate discrimination. Because the focus of this article is on equality across the borders of sex, race, and class, these three Covenants are particularly relevant.

<sup>27</sup> Although the U.S. has ratified both the Convention to Eliminate Racial Discrimination and the Convention Against Torture, neither treaty has been enforced in this country, and of the three primary human rights instruments known as the “International Bill of Rights,” the U.S. is a party only to the ICCPR. Feminist legal scholars ought to be concerned about all of these instruments, not just the Women’s Convention.

<sup>28</sup> Regarding CEDAW, see generally Piccard, *U.S. Ratification of CEDAW*, *supra* note 13. Regarding ICESCR, see generally Ann M. Piccard, *The United States’ Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always With Us?*, 13 SCHOLAR 231 (2010) [hereinafter Piccard, *The United States’ Failure to Ratify the ICESCR*]. The reasons for the United States’ reluctance to join international human rights treaties are many and varied, but at some point it boils down to the U.S.’ reluctance to be held publicly accountable in the international arena.

<sup>29</sup> President Obama has indicated that ratification of CEDAW will be a priority for his administration, but at this point no visible progress has been made in that direction.

<sup>30</sup> I have proposed elsewhere that ratification with no intent to comply may actually do more harm than good because research shows that the human rights performances of some nations actually decline after ratification of relevant human rights treaties. See Piccard, *supra* note 13, at 121 (citing Oona A.

President Carter also signed the International Covenant on Civil and Political Rights in 1977,<sup>31</sup> and this Convention was, perhaps surprisingly, ratified by the U.S. Senate and entered into force in 1992.<sup>32</sup> However, because it is a human rights treaty, the U.S. considers it to be “non-self-executing” and the convention would thus require implementing legislation in order for it to be enforceable in U.S. courts.<sup>33</sup> No such implementing legislation has ever been enacted and, as of this writing, none is pending.

In broad terms, parties to the ICCPR recognize and agree that “the inherent dignity” and the “equal and inalienable rights of all members of the human family” are “the foundation of freedom, justice and peace in the world,” and that “these rights derive from the inherent dignity of the human person.”<sup>34</sup> The Covenant specifically recognizes that “the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his *economic, social and cultural rights*.”<sup>35</sup> Most importantly perhaps, Article Two requires that all

Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002)). However, there are benefits to be gained in the very fact of non-ratification: as long as the U.S. persists in refusing to join these key human rights treaties, the conversation about them remains alive. Once they have been ratified, that conversation stops regardless of whether ratification effects any real change or not. For example, the U.S. has joined the Convention to Eliminate Racial Discrimination, so we no longer engage in the conversation about whether or not ratification would be a good thing. Nonetheless, racial discrimination is obviously alive and well in the United States. This is the quandary surrounding ratification of human rights instruments in this country. For further discussion of the United States' response to human rights treaties, see Tara J. Melish, *From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies*, 34 YALE J. INT'L L. 389, 391 (2009) (“despite strong external and internal human rights commitments, the United States has appeared to flinch, even recoil, when it comes to direct domestic application of human rights treaty norms”). Professor Melish offers an interesting theory for the U.S.' ratification of ICCPR over other human rights treaties, but she predicts a trend toward ratification of other treaties that has yet to be seen.

<sup>31</sup> ICCPR, *supra* note 10. The United States Senate ratified the Convention on June 8, 1992.

<sup>32</sup> See International Covenant on Civil and Political Rights, Declarations and Reservations, U.N. Treaty Collection, [http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en#EndDec](http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec) (last visited Nov. 17, 2011). As is its usual custom, the United States made many reservations to the ICCPR; the gist of all of the reservations, understandings, and declarations is that the U.S. will not be bound by any provision of the Convention that it views as conflicting with the U.S. Constitution. The ICCPR was ratified when other human rights treaties were not, perhaps because civil and political rights are traditionally viewed as “first generation” rights, unlike economic, social and cultural rights.

<sup>33</sup> See *infra* notes 59-63 and accompanying text for further discussion of the questions that surround the need for implementing legislation.

<sup>34</sup> ICCPR, *supra* note 10, pmbl.; see Henkin, *supra* note 26, at 3 (“It is the essence of the idea of human rights that a hard core of autonomy, integrity, and dignity of the individual is not to be sacrificed even to the national interest and the welfare of the group . . .”).

<sup>35</sup> ICCPR, *supra* note 10, pmbl. (emphasis added). The use of the masculine pronoun is almost certainly a sign of the time, rather than of the intent, of the document's drafting. For an on-point analysis of linguistics, grammar, and feminism, see generally Yofi Tirosh, *A Name of One's Own: Gender and Symbolic Legal Personhood in the European Court of Human Rights*, 33 HARV. J.L. & GENDER 247 (2010). The power of language should never be underestimated, but in the context of an international convention written several generations ago, it seems counter-productive to read too much



States Parties guarantee that the Convention will be applied to all persons within the states' jurisdiction, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>36</sup>

Thus, this Convention specifically safeguards civil and political, as well as social and economic, rights for all humans regardless of any personal traits or attributes those humans might possess. It guarantees equality on every meaningful level.<sup>37</sup> One might therefore reasonably ask why any other treaty would be necessary or even desirable.<sup>38</sup>

Furthermore, the ICCPR is largely non-derogable<sup>39</sup> and, unlike other treaties, it is intended to remain in force indefinitely. It guarantees the right to life<sup>40</sup> and the right to equality.<sup>41</sup> It protects all humans from torture<sup>42</sup> and slavery.<sup>43</sup> It guarantees the notion of due process to those who have been accused of crimes,<sup>44</sup> and ensures that they will be treated with dignity while they await trial.<sup>45</sup> It protects every human from the prospect of a debtors' prison,<sup>46</sup> and it assures the right to move about within the state freely.<sup>47</sup> It protects non-citizens as well as citizens,<sup>48</sup> and it guarantees the same level of fair and open judicial proceedings as is provided by the Constitution of

into the choice of pronouns.

<sup>36</sup> ICCPR, *supra* note 10, art. 2.

<sup>37</sup> Henkin, *supra* note 26, at 20 ("But the equality enjoined is equal treatment, the equal protection of the law, equality of opportunity. There is no direct injunction towards equality in fact, an equality of enjoyment.").

<sup>38</sup> In a perfect world, the U.S. would not hesitate to ratify and comply with all international human rights treaties, explicitly honoring the rights and dignity of women, children, racial minorities, and indeed every human being; the benefits of each specific treaty are in no way denigrated by this focus on the ICCPR. However, the ICCPR is currently the most comprehensive human rights treaty to which the U.S. is actually a party, so it seems to be an appropriate path to pursue. Furthermore, the vast majority of UN member states have at least signed, if not ratified, the ICCPR. Notably, the following are among the few UN member states that have yet to even sign the ICCPR: Saudi Arabia, Oman, Myanmar, and Malaysia. Even China has signed it, although China has not ratified the ICCPR. United Nations Treaty Collection, *Status as at 23-03-2012: International Covenant on Civil and Political Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>39</sup> ICCPR, *supra* note 10, art. 4. This means that the treaty's terms specify that its main principles must be accepted by each state party; the typical right to designate certain portions of a treaty as inapplicable is removed in the ICCPR, except that some derogation is permitted "[i]n time of public emergency which threatens the life of the nation."

<sup>40</sup> *Id.* art. 6.

<sup>41</sup> *Id.* art. 3.

<sup>42</sup> *Id.* art. 7.

<sup>43</sup> *Id.* art. 8.

<sup>44</sup> *Id.* art. 9.

<sup>45</sup> *Id.* art. 10.

<sup>46</sup> *Id.* art. 11.

<sup>47</sup> *Id.* art. 12.

<sup>48</sup> *Id.* art. 13.

the United States.<sup>49</sup> The human dignity<sup>50</sup> of every person is specifically recognized, as are the rights to privacy<sup>51</sup> and other specific rights guaranteed by the First Amendment to the U.S. Constitution.<sup>52</sup> The family is recognized as the fundamental unit of society,<sup>53</sup> and the right to participate in the entire spectrum of the political process is guaranteed.<sup>54</sup>

The United States contends that the rights guaranteed within the ICCPR are already covered by the United States Constitution.<sup>55</sup> In general, the U.S. only ratifies human rights instruments with which it believes it is already in compliance.<sup>56</sup> Indeed, the ICCPR is similar to the Constitution of the United States in explicitly stating that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law.”<sup>57</sup> But the ICCPR goes further when it declares that “the law shall prohibit any discrimination and guarantee to all persons equal and effective

<sup>49</sup> *Id.* art. 14.

<sup>50</sup> *Id.* art. 16.

<sup>51</sup> *Id.* art. 17.

<sup>52</sup> Articles 18 and 19 guarantee the right to free speech, religion, opinion, thoughts, etc. Article 20 requires States Parties to agree that no propaganda in favor of war will be permitted. Articles 21 and 22 guarantee the rights to freedom of association and freedom of assembly. *Id.* arts. 18-22.

<sup>53</sup> *Id.* art. 23

<sup>54</sup> *Id.* art. 25.

<sup>55</sup> U.S. DEP'T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 17, ¶ 291 (2005), available at <http://www.state.gov/g/drl/rls/55504.htm#art17>; Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 GA. ST. U. L. REV. 489, 511 n.86 (2011) (“The United States has yet to adopt implementing legislation due to the contention that the U.S. Constitution protects all of the ICCPR rights for which there is no reservation, declaration, or understanding.”); Kenneth Roth, *The Charade of US Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L. L. 347, 349 (2000) (“[T]he government announces that implementing legislation is unnecessary because . . . all the rights for which reservations, declarations or understandings were not registered are already protected by US law.”); see *Senate Judiciary Committee Subcommittee Holds Hearings on the Convention for the Elimination of Discrimination Against Women*, 105 AM. J. INT'L. L. 147, 147 (John R. Crook, ed.) (2011) (quoting Senator Dick Durbin, the Judiciary Committee Chair, as saying “the robust women’s rights protections in U.S. law in many ways exceed the requirements of CEDAW. Even opponents of CEDAW acknowledge that ratifying CEDAW wouldn’t change U.S. law in any way.”). Interestingly, both opponents and proponents of CEDAW argue that existing U.S. laws already provide all of the rights guaranteed by that Convention, yet for some reason the U.S. consistently declines to reconsider joining CEDAW.

<sup>56</sup> For an unfavorable portrait of this process, see generally Roth, *supra* note 55. Mr. Roth explains that between its use of reservations, understandings and declarations, and the non-self-executing doctrine, the U.S. ensures that any rights granted in ratified human rights treaties, such as the ICCPR, remain unavailable for individual litigation by U.S. citizens, and that implementing legislation is never enacted for non-self-executing human rights treaties because “according to the Justice Department lawyers, all the rights for which reservations, declarations or understandings were not registered are already protected by US law. The result is that US citizens are left with no capacity to invoke the treaty in the US courts.” *Id.* at 349. Research confirms that this conclusion is undeniably true. There are no instances in which the U.S. has joined an international human rights treaty and subsequently enacted implementing legislation, and the U.S. courts’ use of any international law is consistently seen as suspect.

<sup>57</sup> ICCPR, *supra* note 10, art. 26.

protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>58</sup> This would seem to provide the legally enforceable protections that a myriad of identity-specific state and federal statutes and judicial decisions, treaties, and conventions have sought to provide, and it clearly provides more protection than the general guarantees of equal protection found in the amendments to the United States Constitution.<sup>59</sup> Because the U.S. is a party to the ICCPR yet declines to actually enforce it within its own borders, human rights advocates might reasonably wonder whether U.S. ratification of any further human rights treaties would mean anything at all in resolving the very real inequalities still facing women, minorities, and the poor, among others, in this nation whose basic human rights seems to be brushed aside with impunity.

## II. THE ICCPR AS CUSTOMARY INTERNATIONAL LAW; ECONOMIC RIGHTS AS CIVIL RIGHTS

Treaties are explicitly recognized in the United States as “the supreme Law of the Land.”<sup>60</sup> However, most treaties, especially human rights treaties, are considered by U.S. courts to be “non-self-executing.”<sup>61</sup> Without implementing legislation, a non-self-executing treaty is not

<sup>58</sup> *Id.*

<sup>59</sup> See U.S. CONST. amend. XIV.

<sup>60</sup> U.S. CONST. art. VI, cl. 2; see Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 324 (1999) (“The Supremacy Clause mandates that ‘all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding,’ not that some treaties or only ‘self-executing’ treaties have that effect. . . . Thus, a declaration of non-self-execution, even if not void under international law, is unconstitutional and void under the Supremacy Clause.”); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1838 (1998) [hereinafter Koh, *Is International Law Really State Law?*] (“With certain exceptions, placing all international law on a federal, subconstitutional plane gives customary international law a lexical comparability with treaties and statutes, which are superior to state law under the Supremacy Clause.”); Martha F. Davis, *Realizing Domestic Social Justice Through International Human Rights: Part I: The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 359 (2006) (“[W]ithout subnational attention to human rights norms, the international legal system fails under the weight of the ‘implementation gap’ between national obligations and their implementation on the state level.”). Professor Davis makes the logical point that “subnational implementation of international human rights is fully consistent with the United States’ federal system . . .” *Id.*, at 361.

<sup>61</sup> William M. Carter, Jr., *Treaties as Law and the Rule of Law: The Judicial Power to Compel Domestic Treaty Implementation*, 69 MD. L. REV. 344, 345 (2010) (“Despite the clear text of the Supremacy Clause, the ‘non-self-executing treaty doctrine’ is often invoked as justification for judicial refusal to recognize individual claims under international human rights treaties. In brief, the non-self-executing treaty doctrine holds that a treaty does not provide a private cause of action in domestic courts unless the treaty itself explicitly or implicitly requires that it be enforceable without additional domestic legislation implementing the treaty.”). Professor Carter provides an excellent summary of the scholarly criticism of the non-self-executing treaty doctrine. *Id.*

considered domestically enforceable by U.S. courts.<sup>62</sup> The courts reason that no cause of action is created when a non-self-executing treaty is ratified, unless and until it is implemented through federal legislation.<sup>63</sup> The practical effect of this non-self-executing doctrine is that treaties do not provide a basis for litigation brought by individuals in U.S. courts.<sup>64</sup> This necessarily limits the practical utility of domestic litigation based on violation of international agreements in the struggle for equality.

However, according to basic principles of international law, if the ICCPR is considered customary international law,<sup>65</sup> no implementing legislation would be necessary in order for the Convention's guarantees to be domestically enforceable within the United States.<sup>66</sup> Some domestic

<sup>62</sup> See, e.g., *Guaylupo-Moya v. Gonzales*, 423 F.3d 121, 133 (2d Cir. 2005) (stating that the ICCPR is not self-executing "'and that when a treaty is non-self-executing it 'does not provide independent, privately enforceable rights.'"). This is despite the fact that the U.S. Constitution specifically says that treaties that have been signed by the President and ratified by Congress, as the ICCPR has been, are the supreme law of the land. The ICCPR is a non-self-executing human rights treaty, and as such is not binding within the U.S. without implementing legislation. See also "'Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002) (quoting *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) ('When the Senate ratified the ICCPR, it specifically declared that the provisions thereof were 'not self-executing.' 138 Cong. Rec. S4784. And, since that time, Congress has never 'enacted implementing legislation for' the ICCPR.');" *Buell*, 274 F.3d at 372 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987)) ('Courts in the United States are bound to give effect to international law and to international agreements, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary authority.');" *Beazley v. Johnson*, 242 F.3d 248, 267-68 (5th Cir. 2001) cert. denied sub nom. *Beazley v. Cockrell* 534 U.S. 945 (2001).

<sup>63</sup> Thus, if some other statute, presumably either state or federal, does create a cause of action the treaty may be domestically enforced. *Carter*, supra note 61, at 347.

<sup>64</sup> Roth, supra note 55, at 349. Some scholars say international law is a part of our federal law, others are just as adamant that it is not. In its most literal sense, international law by itself does not give rise to any cause of action in U.S. courts. See *Id.* But, as Professor Martha F. Davis has written, "when the United States assents to a treaty or other international agreement, the federal system often demands that implementation occur on the state as well as the federal level. If states fail to implement international treaty provisions that address areas traditionally reserved to them [such as criminal, family, and social welfare law], the United States cannot, as a practical matter, achieve compliance with the treaty provisions to which it is a party." Davis, supra note 60, at 362.

<sup>65</sup> Customary international law is followed by states because of a general sense of obligation, rather than because of any written agreement or requirement. See RESTATEMENT THIRD OF FOREIGN RELATIONS LAW §102(2) (1986). "Thus, while nation-states do not specifically assent to customary international law as they do with treaties, it is nevertheless binding on the United States – and therefore on the several states – as the law of nations." Davis, supra note 60, at 364.

<sup>66</sup> See Kevin A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 GEO. J. INT'L. L. 303, 349 (2011) (stating that the provisions of the ICCPR are "[w]idely recognized as binding treaty obligations as well as customary international law."); Paust, supra note 60, at 301 ("The Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts."); see also Koh, supra note 60, at 1824, 1827 ("[J]udicial determinations of international law – including international human rights law – are matters of federal law. . . . [U]nder current practice, federal courts regularly incorporate norms of customary international law into federal law."). Dean Koh also wrote about these issues in *International Law as Part of Our Law*, 98 AM. J. INT'L. L. 43, 53 (2004) (noting that some members of the Supreme Court have recognized that "one prominent feature of a globalizing world is the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international.").

courts have begun to accept the notion of international law as binding, or at least persuasive in the U.S.,<sup>67</sup> despite the recent efforts of some state governments to prohibit reference to or incorporation of international law.<sup>68</sup> In at least one domestic case, an action has been brought before the Inter-American Court of Human Rights in response to a state's failure to protect a woman and her children from domestic violence.<sup>69</sup>

It is generally recognized that the terms of the ICCPR have attained the status of customary international law,<sup>70</sup> and many of the specific guarantees

<sup>67</sup> But the U.S. Supreme Court has thus far been cautious in explicitly recognizing customary international law as enforceable in the U.S. *See, e.g.,* *Medellin v. Texas*, 552 U.S. 491 (2008). Lower federal courts seem more open to the possibility of referring to and perhaps even incorporating international law in domestic cases. *See* *In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7, 17 (E.D.N.Y. 2005) ("International law is internalized by our courts as law of the United States. As recognized by the Restatement (Third) of the Foreign Relations Law of the United States, 'the jurisprudence of the United States has considered . . . rules of international law themselves (and many international agreements) to be incorporated into the law of the United States.'" (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1 *cm. a* (1987)). In addition, at least one court has found that the Alien Tort Claims Act provides an avenue for individual enforcement of the ICCPR. *See* *Estate of Cabello v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D. Fla. 2001) but note that this case did not permit an individual to enforce any human rights guaranteed by the ICCPR, nor did it permit a suit against a governmental entity. The United States Supreme Court has specifically stated that the ICCPR does "not itself create obligations enforceable in the federal courts." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004).

<sup>68</sup> *See, for example,* the Oklahoma legislature's recent enactment of state law that would prohibit state courts from referring to or relying on international law, or, even more specifically, Sharia, the Muslim law. The text of the "Sharia Amendment" specifically dictates that the court of Oklahoma may not look to Sharia law in making decisions, and further specifies that "[t]he courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law." Enr. H.J. Res. 1056, 52nd Leg., 2d Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/legislation/52nd/2010/2R/HJ/1056.pdf>. This amendment was passed by an overwhelming majority of Oklahoma voters on November 2, 2010. Roger Alford, *International Law Banned in Oklahoma State Courts*, OPINIO JURIS, Nov. 3, 2010, <http://opiniojuris.org/2010/11/03/international-law-banned-in-oklahoma-state-courts>. The questions raised by this state action have yet to be answered, but it is unclear whether there is any reason to believe that a legislative body may legally dictate to a judicial body the sources that it may or may not consult in reaching its decisions. The Amendment, known as State Question 755, was immediately challenged in court by the Council of American Islamic Relations and, on November 29, 2010, the United States District Court for the Western District of Oklahoma granted CAIR's petition for an injunction. *Awad v. Ziriax*, 754 F. Supp. 2d 1298 (W.D. Okla. 2010). As of this writing, the results of Oklahoma's election approving Question 755 have been challenged, and the Amendment has not gone into effect.

<sup>69</sup> *Gonzales v. United States*, Petition No. 1490-05, Inter-Am. C.H.R., Report No. 52/07, OEA/Ser.L/V/II.128, doc. 19 (2007), available at <http://www.cidh.oas.org/annualrep/2007eng/USA1490.05eng.htm>. At this writing, no decision has been issued by the Inter-American Court. *See Jessica Gonzales v. U.S.A.*, AM. CIVIL LIBERTIES UNION, Oct. 24, 2011, <http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa> for more details about this case, which is apparently the first time an individual citizen has sought relief in the human rights tribunal against the United States for violation of human rights arising from domestic violence; the case has been pending for years. *See also* Caroline Bettinger-Lopez, *Human Rights at Home: Domestic Violence as a Human Rights Violation*, 40 COLUM. HUM. RTS. L. REV. 19 (2008). No matter what happens in this case, the fact is the Ms. Gonzales' children were murdered by their father when the police declined to enforce her injunction for protection. No court can undo that fact, and her damages are beyond compensation.

<sup>70</sup> *Petty, supra* note 66, at 349.

therein have been recognized as such. The prohibitions of slavery and torture, for example, are well-established principles of customary international law,<sup>71</sup> which is defined as a norm or practice to which States adhere because they feel legally bound to do so, whether or not they are parties to international agreements compelling adherence.<sup>72</sup> While federal courts in the United States do recognize norms of customary international law, the Supreme Court does not automatically interpret that to mean there is a private right of action – but a cautious approach to recognizing such a cause of action is better than an outright refusal.<sup>73</sup>

However, even if the rights guaranteed by the ICCPR have attained the status of customary international law, their status as such can provide, at best, nothing more than grounds for an adversarial action. In any adversarial proceeding there is a winner and a loser.<sup>74</sup> Litigation might provide redress, although calculation of damages is never easy when the

<sup>71</sup> See Sergey Sayapin, *The International Committee of the Red Cross and International Human Rights Law*, 9 HUM. RTS. L. REV. 95, 104 (2009) (“The prohibition of torture or other forms of cruel, inhuman or degrading treatment is another fundamental human right that is protected both by IHRL [international human rights law], IHL [international humanitarian law] and international criminal law. All relevant human rights treaties prohibit such ill-treatment as a non-derogable right, and torture is contrary to customary international law.”). It is worth noting here that the U.S., in its ratification of the ICCPR, attempted to exempt itself from application of the prohibition of imposing the death penalty on anyone under the age of 18; most states parties to the ICCPR would view executing juvenile offenders as a violation of the right to life and/or as cruel and unusual punishment, but the United States consistently takes the position that executing juveniles is appropriate and legal.

<sup>72</sup> Cf. Statute of the International Court of Justice, art. 38, ¶ 1, available at [http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II). The Statute provides as follows: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.” *Id.*

<sup>73</sup> See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) (“While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.”); see generally Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1335-36 (2007) (describing Justice Kennedy’s references to the European Court of Human Rights in his opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), and the controversy surrounding those references).

<sup>74</sup> Non-adversarial methods of dispute resolution are therefore referred to as methods for “alternative dispute resolution,” and those alternative methods are based on agreement between the parties rather than imposition of a decision by an outside decision-maker such as a judge or magistrate. Alternative dispute resolution works best when there is some parity between the parties to the dispute; when the balance of power weighs heavily in favor of one party to a dispute, alternative dispute resolution is of dubious value. See Waheeda Amien, *A South African Case Study for the Recognition and Regulation of Muslim Family Law in a Minority Muslim Secular Context*, 24 INT’L J.L. POL’Y & FAM. 361, 380 (2010) (“[A]lternative dispute resolution mechanisms could be a prudent non-adversarial option for parties who are in a relationship where the power balance is relatively equal. However, they are inappropriate when the relationship is defined by an imbalance of power that tilts in favour of the husband. In such a situation, the wife would be more vulnerable and have weaker negotiating tools that could disadvantage her.”) By analogy, alternative dispute resolution mechanisms are inappropriate in situations that pit one individual, whose human rights have already been deprived, against a government, corporate, or individual entity that has perpetrated the deprivation; victims of human rights deprivations do not have parity with the violators of their rights.

claim arises from invidious discrimination.<sup>75</sup> But litigation alone does not change attitudes or culture.<sup>76</sup> If it did, racism would be dead in the United States. Clearly, it is not.<sup>77</sup> Therefore, it seems logical to look elsewhere for appropriate remedies to the ongoing struggles for equality in the United States.

Women and others who want to re-think equality must address specific causes and symptoms of discrimination: the stereotyping and denigration of those who are perceived as different.<sup>78</sup> Women should not ignore the fact that today, much of the struggle for equality in the United States, whether on behalf of women or of other identity groups, is a response to the growing and unnecessary gap between the rich and the poor in this country.<sup>79</sup> Income inequality exists across the entire spectrum of U.S. society: men, women and children of all races, religions, and ages suffer

<sup>75</sup> A thorough analysis of the federal courts' approach to punitive damages in general, including those that arise from discrimination claims, may be found by reading Jim Gash, *The End of an Era: The Supreme Court (Finally) Butts Out of Punitive Damages for Good*, 63 FLA. L. REV. 525 (2011). Professor Gash examines the punitive damages decisions of Justice Sotomayor at various stages of her judicial career, and describes the different formulas used to calculate such damages. *Id.* at 593-95.

<sup>76</sup> It is true that statutes do have a normative effect on behavior, and that over time the mere existence of a law may bring about a degree of social change. See Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74-75 (2011) (noting that, among other things, "litigation as a social movement tactic can deradicalize both the message and the objectives of a movement . . . [and] can reshape how the movement defines its identity and understands itself.").

<sup>77</sup> From *Brown v. Bd. Of Educ.*, 347 U.S. 483 (1954) through today, racism has been at the heart of litigation in the United States. Cf. Kristina M. Campbell, *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of "Backdoor" Local Immigration Regulations*, 25 GEO. IMMIGR. L.J. 1, 2 (2010) (discussing the racist motives underlying the creation of antisolicitation laws and the litigation they generate).

<sup>78</sup> For analysis of the different approaches to equality, see Jessica A. Clarke, *Beyond Equality? Against the Universal Turn in Workplace Protections*, 86 IND. L.J. 1219, 1222 (2011) ("The shift to universal protection . . . accords with critical theories of identity in that it changes the focus from protected status characteristics to protected or prohibited activities. . . . [T]he new generation of sex discrimination is based not on the belief in women's inferiority, but on gendered norms of behavior or stereotypes about family responsibilities for both women and men.").

<sup>79</sup> Zaid Jilani, *Graph: Income Inequality in U.S. Worse Than Ivory Coast, Pakistan, Ethiopia*, THINKPROGRESS (May 4, 2011), <http://thinkprogress.org/2011/05/04/us-unequal-uganda-pakistan>. According to ThinkProgress.org, "the United States is now about as economically unequal as Uganda and more unequal than countries like Pakistan or the Ivory Coast. . . . Income inequality in the United States is actually higher than at any other time in modern history since the Great Depression." *Id.* ThinkProgress is a project of the Center for American Progress Action Fund, a non-partisan nonprofit group whose blog "seeks to provide a forum that advances progressive ideas and policies." About ThinkProgress, THINKPROGRESS, <http://thinkprogress.org/about> (last visited Nov. 17, 2011). ThinkProgress' editor is the Harvard and Georgetown-educated lawyer Faiz Shakir. *Id.* The methodologies used in calculating income inequality by ThinkProgress.org are the same as those used by the U.S. Census Bureau. See also LARRY M. BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 9-10 (2008) ("Over the past three decades, income growth has been much slower and much less evenly distributed. Even for families near the top of the income distribution, the average rate of real income growth slowed substantially. . . . For less affluent families, real income growth slowed to a crawl. . . . [I]ncome gains among the ultra-rich have vastly outpaced those among the merely affluent."). There seems to be no room for any logical argument that income inequality is not a growing problem in the U.S.

the ill-effects of income inequality.<sup>80</sup> If the poor were to organize and form a social movement, their numbers and strength would be legion.<sup>81</sup> Similarly, Blacks and Latina/os in the U.S. face racial discrimination in education, employment, and housing every day.<sup>82</sup> It would be a mistake for women to ignore these shared experiences.<sup>83</sup>

Clearly, sex discrimination might be best addressed by enforcement of the Convention on the Elimination of All Forms of Discrimination against Women, and income inequality might be best addressed by enforcement of the International Covenant on Economic, Social and Cultural Rights; unfortunately, the U.S. is not a party to either the ICESCR or CEDAW, nor is it likely to become a party any time soon.<sup>84</sup> But the U.S. is a party to the ICCPR,<sup>85</sup> which explicitly safeguards the economic and social rights, as

<sup>80</sup> This is another illustration of intersectionality, which has been defined as an approach that "recognizes that people experience stereotyping and discrimination based on a combination of gender, race, ethnicity, and ability, and that these forms of multiple discrimination or bias are distinct from any one form of discrimination." Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights*, 18 PAC. RIM L. & POL'Y J. 293, 301 (2009).

<sup>81</sup> The U.S. Census Bureau defined poverty in 2010 as approximately \$11,000 a year for a single person, and \$14,000 a year for a couple. U.S. Census Bureau, *Poverty Thresholds for 2010*, available at <http://www.census.gov/hhes/www/poverty/about/overview/measure.html> (last visited Nov. 17, 2011). In 2009, the Census Bureau estimated that there were 43.6 million people living in poverty in the United States. U.S. Census Bureau, *About Poverty – Highlights*, <http://www.census.gov/hhes/www/poverty/about/overview/index.html> (last visited Nov. 17, 2011). This represented an increase from 39.8 million in 2008, and was the fourth consecutive year of rising poverty rates. U.S. Census Bureau, *Table 24: Number in Poverty and Poverty Rate by Race and Hispanic Origin Using 3-Year Averages*, available at <http://www.census.gov/hhes/www/poverty/data/historical/people.html> (last visited Nov. 17, 2011). More people are living in poverty in the U.S. now than in any of the 51 years in which poverty statistics have been maintained by the Census Bureau. See U.S. Census Bureau, *About Poverty – Highlights*, <http://www.census.gov/hhes/www/poverty/about/overview/index.html> (last visited Nov. 17, 2011). These and many other statistics may be viewed at <http://www.census.gov/hhes/www/poverty/about/overview/index.html>.

<sup>82</sup> In some respects, these groups might be considered subalterns: the voiceless other whose true history is not seen or heard by the privileged mainstream. See Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271, 287 (Cary Nelson & Lawrence Grossberg eds., 1988) ("[B]oth as object of colonialist historiography and as subject of insurgency, the ideological construction of gender keeps the male dominant. If, in the context of colonial production, the subaltern has no history and cannot speak, the subaltern as female is even more deeply in shadow.").

<sup>83</sup> Low-income Black women and Latinas are among the least privileged members of our society. Rather than asking whether the resulting inequality is based on sex, class, or race we should all be having the conversation about how to end the disgraceful inequality that these and other Americans face. Furthermore, white women should be aware of the very real possibility that we focus on gender rather than race because of our own white privilege. See Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 246-47 (2005) (addressing the "transparency" or "invisibility" of white privilege and noting that "[t]hose with privilege can afford to look away from mistreatment that does not affect them personally.").

<sup>84</sup> President Obama has indicated that ratification of CEDAW is a priority for his administration, but there has been no mention of ratification of the ICESCR.

<sup>85</sup> The United States did ratify the ICCPR, albeit with significant reservations, understandings, and declarations. A description of the international reaction to those RUDs can be found in Matthew J.



well as the civil and political rights, of all human beings.<sup>86</sup> Thus, there is a legal structure already in place to correct the gross inequalities that persist in this country and that are fostered by ongoing attitudes of prejudice and discrimination against, and distrust of, “others” such as women, racial minorities, and the poor, to name just a few.<sup>87</sup>

But to advocate for ratification of yet another international instrument, whether it addresses discrimination against women,<sup>88</sup> or discrimination based on race,<sup>89</sup> or it guarantees economic, social and cultural rights<sup>90</sup> as somehow distinct from civil and political rights,<sup>91</sup> would seem to be, at best, beside the point. If law is the answer to inequality, most of the law we need is already in place. All that remains to be done is to enact implementing legislation for the ICCPR, or to recognize its status as customary international law, so that the ICCPR may be enforced within the United States. Congress could enact such legislation, or the courts could accept the Covenant’s protections as customary international law, and the lawsuits could begin to roll across this country. Whether such lawsuits would have any chance of actually correcting social injustice and inequality is, of course, not clear.

The problem with most human rights instruments and legislation, for those who advocate for equality, is the persistent notion in the United States that human rights, and in particular economic, social and cultural rights,<sup>92</sup> are non-justiciable.<sup>93</sup> “Economic, social and cultural rights

Jowanna, 42 U.S.C. § 1983: *A Legal Vehicle with No Human Rights Treaty Passengers*, 9 U.N.H. L. REV. 31, 42-55 (2010). In a nutshell, the international reaction was not favorable to the United States because, as usual, the U.S. attached reservations, understandings, and declarations that essentially said nothing in the treaty would require anything of this nation beyond what it already does under domestic law. *See id.*

<sup>86</sup> See ICCPR, *supra* note 10, pmbl.

<sup>87</sup> By their very language, the protections afforded by the CEDAW or ICESCR would, to a large extent, be duplicative of the rights already provided by the ICCPR. See Piccard, *U.S. Ratification of CEDAW*, *supra* note 13, at 123 (explaining the similarities between the rights protected by CEDAW and the ICCPR); see also Piccard, *The United States’ Failure to Ratify the ICESCR*, *supra* note 28, at 236 n.22 (describing the connection between the rights discussed in the ICCPR and the rights described in the ICESCR).

<sup>88</sup> CEDAW, *supra* note 7.

<sup>89</sup> See International Convention on the Elimination of All Forms of Racial Discrimination, to which the US is currently a party, with reservations, and without implementing legislation, Dec. 21, 1965, 660 U.N.T.S. 995 [hereinafter ICERD]

<sup>90</sup> ICESCR, *supra* note 9.

<sup>91</sup> ICCPR, *supra* note 10.

<sup>92</sup> Economic, social, and cultural rights are normally distinguished from civil and political rights, but “there is no water-tight division between different categories of human rights.” See Jernej Letnar Cernic, *Corporate Obligations Under the Human Right to Water*, 39 DENV. J. INT’L. L. & POL’Y. 303, 305 (2011) (quoting Martin Scheinin, *Human Rights Committee: Not Only a Committee on Civil and Political Rights*, in SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 540, 540 (Malcolm Langford ed., 2008)).

generally have a programmatic nature and are not always directly justiciable to the same extent that civil and political rights are.”<sup>94</sup> In this context, no amount of litigation or legislation will truly enable any group to achieve equality unless equality is consistently defined as a civil or political right, rather than an economic, social or cultural one.<sup>95</sup>

It would therefore be advantageous, and much more practical, for women who are interested in re-thinking equality<sup>96</sup> to put the ICCPR to work rather than to advocate for ratification of either ICESCR or CEDAW. If equality is a civil and/or political right, rather than an economic, social or cultural right, then it is much more easily enforced.<sup>97</sup> This brings the analysis back to the long-standing view of civil and political rights as “first generation” rights, while economic, social and cultural rights are “second generation” rights.<sup>98</sup> The terminology itself denigrates and trivializes anything that is not viewed as a top-priority, “first generation” right.<sup>99</sup>

<sup>93</sup> See CHRISTINE CHINKIN, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, THE PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS POST-CONFLICT 7 (2009), available at [http://www2.ohchr.org/english/issues/women/docs/Paper\\_Protection\\_ESCR.pdf](http://www2.ohchr.org/english/issues/women/docs/Paper_Protection_ESCR.pdf) (noting that “[t]he linkage between delivery of economic and social rights and social insecurity and survival, both as a cause of conflict and as an obstacle to sustainable peace, is insufficient[] . . .”).

<sup>94</sup> Cernic, *supra* note 92, at 305.

<sup>95</sup> Civil and political rights have been referred to as “classic” rights, which lend themselves to adjudication and enforcement, while economic, social and cultural rights have been viewed as “principles” meant to guide states’ policies rather than to confer enforceable rights on individuals. See Erika Szyszczak, *Controlling Dominance in European Markets*, 33 FORDHAM INT’L L. J. 1738, 1765 (2010) (citing Lord Goldsmith Q.C., *A Charter of Rights, Freedoms and Principles*, 38 COMMON MKT. L. REV. 1201, 1212 (2001)). It is worth noting however, that the United Nations Human Rights Committee has generated a body of case law adjudicating specific individual rights, including the right to be free from discrimination based on sex, as guaranteed by the ICCPR and the Optional Protocol thereto. See ALEX CONTE, SCOTT DAVIDSON & RICHARD BURCHILL, *DEFINING CIVIL AND POLITICAL RIGHTS, THE JURISPRUDENCE OF THE UNITED NATIONS HUMAN RIGHTS COMMITTEE* 168-69 (2004).

<sup>96</sup> Catharine A. MacKinnon has recently written that “[w]omen are at the midpoint of our struggle for legal equality as a means to social equality. We stand at a tipping point where the chance to gain new ground and to lose ground gained are in equipoise.” MacKinnon, *A Love Letter to Ruth Bader Ginsburg*, *supra* note 11, at 177. I do not know how we can determine that we are at the midpoint unless we are able to see into the future and determine when our struggle might end (if ever), but there can be no argument with Professor MacKinnon’s point that the legal equality women have thus far attained does not make much difference without “meaningful delivery on civil and human rights for women, including in employment, education, reproductive rights, and violence. Despite legal inroads, women’s material and physical insecurity and disadvantage continue, in reality, to be characterized by sex-based poverty and gender-based abuse with impunity from childhood on.” *Id.*

<sup>97</sup> The danger to be avoided here is the possibility that moving away from the focus on sex will “dilute feminist . . . gains and mask inequality.” Clarke, *supra* note 78, at 1219.

<sup>98</sup> Siba N. Grovogui, *To the Orphaned, Dispossessed, and Illegitimate Children: Human Rights Beyond Republican and Liberal Traditions*, 18 IND. J. GLOBAL LEGAL STUD. 41, 45 (2011) (“[T]he idea that human rights categories have a discrete chronology in which civil and political rights appear as first generation rights, followed by second and third generations of rights applicable to economic and finally cultural categories is myopic.”).

<sup>99</sup> Whether intentional or not, the rhetoric of “generations of rights” has come to mean that some rights are “better” than others. See *id.* at 42 (stating that “whatever their merits, legitimizations of human rights as conceived in the West have been suffused with less meritorious claims . . . [such as] that civil and political rights take precedence over social and economic rights . . .”); see also Juan E.

There is ample room to debate whether a non-justiciable right is, in fact, a right at all; in the U.S. it seems that it is not.<sup>100</sup>

The ICCPR requires states parties to refrain from all forms of discrimination because discrimination both demonstrates and causes inequality. "Each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>101</sup> This guarantee of non-discrimination is a prominent part of the ICCPR, and by its terms is a guarantee of "first generation" civil and political rights in addition to economic, social and cultural rights.<sup>102</sup> If the goal of any international convention is to make equality reality, whether for women or for any other identified group in the United States, what more could possibly be needed than this specific language?<sup>103</sup>

It thus seems that anything that a law could accomplish in terms of equality is more than adequately covered by the ICCPR, and little stands to be gained by resorting to any other international instrument that could be construed as addressing the chronically nebulous realms of discrimination and of economic, social, and cultural rights.<sup>104</sup> If a law is what is needed, that law probably already exists in the United States.<sup>105</sup> But the limitations of litigation based on law as a real avenue to equality are self-evident in the

Mendez, *International Human Rights: The 60<sup>th</sup> Anniversary of the UDHR*, 30 U. PA. J. INT'L. L. 1157, 1162 (2009) (suggesting that it is time to "abandon the idea of 'generations of rights' which, whatever the original intent of the authors, has resulted in practice of considering economic, social, and cultural rights as 'second category' rights.").

<sup>100</sup> See Albie Sachs, *Enforcement of Social and Economic Rights*, 22 AM. U. INT'L. L. REV. 673, 693 (2007) ("If a person does not have the right to go to court, a basic civil political right, and a right to legal representation, that person cannot use the Constitution to get 'bread rights.' It appears that in the United States some people would say it is not inappropriate simply to have freedom rights; presumably it means that when one is dying of hunger one can use one's last breath to curse the government.").

<sup>101</sup> ICCPR, *supra* note 10.

<sup>102</sup> As its name indicates, everything that is addressed in the ICCPR is viewed as a civil and/or political right. This is distinguishable from the protections afforded in the International Covenant on Economic, Social and Cultural Rights (in name if not in substance).

<sup>103</sup> It is therefore unnecessary to address the alleged non-justiciability that plagues efforts to enforce economic, social and cultural rights.

<sup>104</sup> Again, nothing in this statement should be seen as trivializing any of the important progress achieved thus far by advocates who press for ratification of CEDAW. Instead, I simply suggest that we may have reached the limits of that conversation, and it may be in our best interests to change the topic just slightly to include more people.

<sup>105</sup> See Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53, 96 (2011) ("[I]t is certainly safe to s[ay] that from this nation's origins to modern times, custom has played a role in our jurisprudence.").

adversarial nature of justiciability.<sup>106</sup> Litigation is one approach to the struggle for equality, but it is neither the only, nor the best, approach.<sup>107</sup>

### III. THE TRUTH AND RECONCILIATION MODEL

Rather than engaging solely in more adversarial proceedings that pit groups against each other, against their government, and against any culturally empowered entity, those who advocate for genuine equality for all in the United States<sup>108</sup> would do better to use some model of dispute resolution that might actually dismantle this country's pervasive attitudes of distrust and discrimination with a goal of truth and reconciliation.<sup>109</sup> Truth and Reconciliation Commissions ("TRCs") allow communities (at any level – national, state, or local) to acknowledge the past and to move into the future.<sup>110</sup> There are no winners and there are no losers.<sup>111</sup> Truth commissions enable the perpetrators of injustice to heal just as much as they allow the victims to do so.<sup>112</sup> The work of such commissions does not

<sup>106</sup> *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (noting that federal courts have jurisdiction to hear only those disputes that involve a "case or controversy," meaning "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process"). The resolution of a case or controversy necessarily involves winners and losers, with judgment imposed by some outside force, as opposed to any sort of alternative dispute resolution or, more significantly, any sort of attitude or culture change.

<sup>107</sup> For a discussion of whether it even matters whether human rights are framed as legal or non-legal claims, see David A. Sklansky, *Private Policing and Human Rights*, 5 L. & ETHICS HUM. RTS. 112, 123 (2011), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1054&context=lehr> (noting that whether a claim is framed in terms of law or in terms of morality, "the audience for either kind of argument could be courts (domestic or international), legislatures, public officials, or the citizenry.").

<sup>108</sup> Genuine equality for all in the U.S. is harder for some to imagine than it is for others. For a discussion of what such a society might look like, see Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1620-21 (2010) (quoting John Rawls for the proposition that equality necessitates "the assurance of a generalized commitment to the fundamental elements of justice and dignity that a well-ordered society is supposed to furnish its citizens as part of 'the public culture of a democratic society.'").

<sup>109</sup> See Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT'L. L. 49, 72 (2011), available at <http://ejil.oxfordjournals.org/content/22/1/49.full.pdf+html> ("Traditional routes of laws, courts, and litigation can be supported by complementary models of justice. Truth and reconciliation models are useful for contextualizing human rights atrocities.").

<sup>110</sup> The tension between forgetting and remembering the painful past is clear: "Remembering is not easy, but forgetting may be impossible. There are a range of emotional and psychological survival tactics for those who have experienced such brutal atrocities. . . . Only by remembering, telling their story, and learning every last detail about what happened and who was responsible were they able to begin to put the past behind them." PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS 2 (2002). Ms. Hayner further asks, "can a society build a democratic future on a foundation of blind, denied, or forgotten history?" *Id.* at 4.

<sup>111</sup> Or, to put it another way, everyone benefits from the process of reconciliation. This is distinguishable from the end of litigation, at which time, in my experience, one party might have been declared the "winner" but no one is satisfied by or happy with the results.

<sup>112</sup> This assertion is supported by recent programs facilitated by the Florida Holocaust Museum at

necessarily stem from “justiciable” rights,<sup>113</sup> and the goal is not simply to obtain some enforceable order. Instead, the truth and reconciliation process allows the members of a community to reconcile themselves with their past and decide, as one, how to move forward.

Truth and Reconciliation Commissions are generally utilized in post-conflict times, in “[c]ountries in the process of transitioning from conflict to peace (or at least to something less than conflict) . . . .”<sup>114</sup> But they are also appropriate in communities that are ready to confront their own troubled pasts, perhaps spurred by some specific event that was fueled by discrimination and hatred.<sup>115</sup>

International human rights instruments, even the ICCPR, are notoriously difficult to enforce.<sup>116</sup> But the reporting mechanisms of such instruments<sup>117</sup> are analogous to the processes utilized by truth commissions: “Indeed, human rights treaties are intended to be implemented at the local level with

which a descendant of a Nazi soldier and a Holocaust survivor spoke together about the atrocities that were perpetrated by the Nazis against the Jews and others. Waveney Ann Moore, *Nazis' and Holocaust Victims' Descendants Discuss the Effects on Their Lives*, ST. PETERSBURG TIMES, Apr. 2, 2011, available at <http://www.tampabay.com/news/humaninterest/article1161447.ece> (quoting the granddaughter of a member of Hitler's Wehrmacht as saying, “I can't change the past, but I want to prove that I have learned something from it and I want to go on the right path.”).

<sup>113</sup> See Truth and Reconciliation Commission of Canada, *About Us*, <http://www.trc-cvr.ca> (last visited Nov. 17, 2011) (stating that in Canada, the TRC was established as a part of a multi-million dollar settlement against the national government based on the abuses that occurred in the Indian Residential School System).

<sup>114</sup> Dina Francesca Haynes et al., *Gendering Constitutional Design in Post-Conflict Societies*, 17 WM. & MARY J. WOMEN & L. 509, 509-10 (2011) (noting that communities recovering from conflict provide opportunities for “writing or rewriting local and national laws, reintegrating soldiers, providing rehabilitation and redress for victims, establishing or re-establishing the rule of law, building or rebuilding human rights institutions and governance structures, changing cultural attitudes, and improving socioeconomic conditions.”).

<sup>115</sup> Both Greensboro, North Carolina and Tulsa, Oklahoma have utilized truth and reconciliation commissions to address the violent symptoms of racial prejudice. See Kim D. Chanbonpin, “*We Don't Want Dollars, Just Change*”: *Narrative Counter-Terrorism Strategy, an Inclusive Model For Social Healing, and the Truth About Torture Commission*, 6 NW. J.L. & SOC. POL'Y. 1, 29 (2011) (“[C]ommunity members in the U.S. cities of Tulsa, Oklahoma and Greensboro, North Carolina convened commissions of inquiry charged with investigating historical wrongs and addressing the current impact of those past wrongs on the affected communities.”); see also LISA MAGARRELL & JOYA WESLEY, *LEARNING FROM GREENSBORO: TRUTH AND RECONCILIATION IN THE UNITED STATES* 3, 6 (2008) (the mandate in Greensboro was that the Committee should “examine the ‘context, causes, sequence and consequence’” of the November 3, 1979 murders of five anti-Klan protestors by members of the Ku Klux Klan and the American Nazi Party).

<sup>116</sup> Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 516 (2011) (“Human rights treaties have famously weak enforcement mechanisms – some create toothless committees or commissions, others create nothing at all . . . .”).

<sup>117</sup> Article 40 of the ICCPR provides that “[t]he States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights . . . .” Reports to the Committee are required within the first year that a party is a member of the Covenant and thereafter as often as the Committee requests. This reporting process is the full extent of the Covenant's “enforcement” mechanisms. ICCPR, *supra* note 10, art. 40.

a great deal of democratic input. They provide mechanisms and opportunities for reporting on conditions within communities (both positive and negative) . . . .”<sup>118</sup> This reporting process<sup>119</sup> is as close to an enforcement mechanism as a human rights treaty can ever come, yet it does not necessarily stem from some “justiciable” right in the way that U.S. lawyers perceive that term.<sup>120</sup> The results of the reporting process thus have the potential to be similar to the results of a truth and reconciliation commission, albeit without necessarily having the advantage of coming from within the affected community rather than being imposed from without.<sup>121</sup>

Restorative justice, or reparation, need not be the primary goal; centuries of discrimination do not really lend themselves to reparations.<sup>122</sup> By way of contrast, consider the efforts of the indigenous peoples of North America to seek reparations for the loss of their lands<sup>123</sup>: “[R]edress of Indian claims and the healing of the American nation – crucial foci of the drive toward perfection – necessitate dialogue, reconciliation, and joint authorship of a future history of peace, harmony, and justice.”<sup>124</sup> But “[c]ompensation and apologies, gestures potentially part of an amicable settlement, are not germane to the resolution of Indian claims for injustices that cannot be remedied save by reinvestiture of lands and sovereignty in self-determining Indian tribes.”<sup>125</sup> The indigenous peoples seek restoration of specific

<sup>118</sup> Risa E. Kaufman, *State and Local Commissions as Sites For Domestic Human Rights Implementation*, in HUMAN RIGHTS IN THE UNITED STATES: BEYOND EXCEPTIONALISM 89 (Shareen Hertel & Kathryn Libal eds., 2011). Professor Kaufman further writes that local commissions are in the perfect position to train “the community to promote equality and nondiscrimination, conduct hearings to explore and examine the relevance of findings by international treaty bodies, and issu[e] recommendations for future action.” *Id.* at 89-90.

<sup>119</sup> The ICCPR, for example, provides in Article 28 that a Committee shall be established, and in Article 40 that states parties to the Covenant must submit periodic reports to the Committee regarding their efforts to comply with the Covenant. ICCPR, *supra* note 10, arts. 28, 40.

<sup>120</sup> See Abebe, *supra* note 116, at 516 (describing Dean Harold Hongju Koh’s approval of litigation as “procedurally sound and more likely to produce tangible victories” than attempts to utilize the “toothless” enforcement mechanisms in human rights treaties).

<sup>121</sup> The U.S. submits to periodic reviews pursuant to international law; at this writing, the report is pending from the 2011 Universal Periodic Review.

<sup>122</sup> See Karen Parker, Speech Before the U.N. Commission On Human Rights (1995) (“[H]ow much compensation do you think ought to be paid to a woman who was raped 7,500 times? What would the members of the Commission want for their daughters if their daughters had been raped even once[?]”).

<sup>123</sup> Loss of their land was of course only one aspect of the genocide suffered by the indigenous peoples of North America. See SAMUEL TOTTEN & PAUL R. BARTOP, *DICTIONARY OF GENOCIDE* 210 (2008); see also ANDREA SMITH, *CONQUEST: SEXUAL VIOLENCE AND AMERICAN INDIAN GENOCIDE* 47 (2005).

<sup>124</sup> William Bradford, “*With a Very Great Blame On Our Hearts*”: *Reparations, Reconciliation, and an American Indian Plea For Peace With Justice*, 27 AM. INDIAN L. REV. 1, 18 (2002-2003).

<sup>125</sup> *Id.* at 17.

things: land and sovereignty. Women, racial minorities, and the poor seek equality. The goals are not the same.<sup>126</sup> Women, for example, have been, and continue to be, the victims of discrimination in the U.S.,<sup>127</sup> but not literally the victims of genocide, slavery, or ethnic cleansing as Professor William Bradford has written is true for the indigenous peoples of this continent.<sup>128</sup> In the United States, the goal for any Truth and Reconciliation Commission must be to serve as a “vehicle for social change,” and “an inspiration to further truth-seeking efforts in the United States.”<sup>129</sup>

South Africa has attempted to utilize the Truth and Reconciliation process in the wake of its apartheid system; the results are mixed, at best.<sup>130</sup> Much has been written about the use of Truth and Reconciliation

<sup>126</sup> Anecdotally, at least one indigenous nation has been heard to say that they do not seek protections from the United States Constitution; they are a sovereign nation with a treaty relationship to the United States, and they want that treaty honored. Women in the United States make no such claims, and could not do so even if they wanted to because there is no definable “nation” of women in this country, and certainly not one with a history of treaty relationships with the United States.

<sup>127</sup> Women’s pay, for example, still lags behind that of their male counterparts: In 2009, the United States Government Accountability Office reported to Congress that while “the pay gap between men and women in the U.S. workforce has narrowed since the 1980s, numerous studies have found that a disparity still exists. . . . [W]omen in the general workforce earned, on average, 20 cents less for every dollar earned by men in 2000 when differences in work patterns, industry, occupation, marital status, and other factors were taken into account.” U.S. Gov’t Accountability Office, GAO-09-279, *Women’s Pay: Gender Pay Gap in the Federal Workforce Narrows as Differences in Occupation, Education, and Experience Diminish* 1 (2009), available at <http://www.gao.gov/new.items/d09279.pdf>. For further discussion of the United States’ recent track record of discrimination, see Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL’Y 77, 80 (2009) (assessing the politicization of civil rights during the presidency of George W. Bush).

<sup>128</sup> See Bradford, *supra* note 124, at 19-24. Beyond even the need for reparations, clearly there are situations where international criminal tribunals are the only acceptable response to atrocities, such as the international criminal tribunals for Rwanda, the former Yugoslavia, and even the Nuremberg trials. On American soil, the defendants accused of coordinating the September 11 attacks were brought to trial. Reconciliation in such cases would be out of the question in this country. For further analysis of whether criminal prosecution is necessary or appropriate for international human rights violations, see Paul van Zyl, *Dilemmas of Transitional Justice: The Case of South Africa’s Truth and Reconciliation Commission*, 52 J. INT’L. AFF. 647, 648 (1999).

<sup>129</sup> MAGARRELL, *supra* note 115, at xiv. The authors wrote that they “hope that this book will motivate others to uncover and acknowledge the truth about racist violence, class differences, and other systemic problems that persist in the United States. We believe doing so is a way to promote real change, deepen democracy, and work for justice in the fullest sense of the word.” *Id.* These are the goals that will help us all to heal and move forward. None of them is the goal of any adversarial civil or criminal legal proceeding.

<sup>130</sup> South Africa continues to have deplorably high rates of inequality in terms of income, gender, and education. See Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307, 319-23 (1998); Malcolm Keswell, *Education and Racial Inequality in Post Apartheid South Africa* 2 (Santa Fe Inst., Working Paper No. 2004-02-008, 2004), available at <http://www.santafe.edu/media/workingpapers/04-02-008.pdf> (“[W]hile opportunities have been significantly equalized, as evidenced by an overall decline in the white-black wage differential, a new form of racial inequality has emerged, operating not directly on income as in the heyday of job reservation, influx control and school segregation, but indirectly, through inequality in the rewards to effort, as witnessed by sharply divergent patterns in the returns to education between the races.”); Jonathan L. Marshfield, *Evaluating South Africa’s Post-Apartheid Democratic Prospects Through the*

Commissions in post-apartheid South Africa.<sup>131</sup> South Africa was a country in transition, with a new constitution, government and institutions.<sup>132</sup> The Truth and Reconciliation Commission was just one of many tools employed in an effort to undo the damage that was done by the system of apartheid.<sup>133</sup>

South Africa is perhaps the best-known example of the use of a Truth and Reconciliation Commission;<sup>134</sup> but other commissions have served different nations in times of transition, including Northern Ireland.<sup>135</sup> However, here in the U.S. we need not look farther than Canada for what is perhaps a more fitting analogy. On June 11, 2008, the Prime Minister of Canada issued a full apology for the government's role in the Indian Residential Schools System that persisted for more than a century, beginning in the 1870s.<sup>136</sup> Young Aborigine children were forcibly removed from their homes; many died before they were old enough to return, and entire communities were decimated by the loss of generations of children.<sup>137</sup> In his formal apology, the Prime Minister acknowledged that

*Lens of Economic Development Theory*, 9 RICH. J. GLOBAL L. & BUS. 431, 434 (2010);

<sup>131</sup> See, e.g., CHARLES VILLA-VICENCIO & WILHELM VERWOERD, LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (2000).

<sup>132</sup> *Id.* at xv ("TRC was but one initiative in a bridge-building exercise . . . designed to take the country from a deeply divided past, characterised [sic] by strife, conflict, suffering and injustice, to a future founded on the recognition of human rights, democracy and peaceful coexistence.").

<sup>133</sup> *Id.* at 17 ("[C]reation of a truth commission offered the opportunity to deal with the past without dwelling on it and to establish the moral foundation from which to build a truly new South Africa.").

<sup>134</sup> The South African experience is relatively recent and is thus the one with which most people are currently familiar. Again, in South Africa, the Truth and Reconciliation Commission was designed to address the need for the nation to begin healing after apartheid, the official government policy of South Africa from 1948 to 1990, finally came to an end. The level of success achieved is debatable, as South Africa continues to suffer from extreme income inequality, poverty and lack of social services. See Makau wa Mutua, *Hope and Despair For a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 70 (1997) (pointing out that the use of "rights discourse" by the new South African government permitted the status quo to continue, with blacks and women remaining where they had been under apartheid: "excluded and at the margins").

<sup>135</sup> BRANDON HAMBER, TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH RECONCILIATION AND MENTAL HEALTH 3 (2009).

<sup>136</sup> See Truth and Reconciliation Commission of Canada, About Us, <http://www.trc-cvr.ca> (last visited Nov. 17, 2011). Then Prime Minister Stephen Harper's apology was prompted by the Indian Residential Schools Settlement Agreement, of which the TRC is also a component. His apology acknowledged that, "the absence of an apology has been an impediment to healing and reconciliation." Stephen Harper, Prime Minister of Canada, Official Apology for Residential Indian Schools System (June 11, 2008), available at <http://www.aadnc-aandc.gc.ca/eng/1100100015644> [hereinafter Prime Minister of Canada, Official Apology].

<sup>137</sup> See Prime Minister of Canada, Official Apology, *supra* note 136. The government and various churches, including Catholic and Anglican, took the paternalistic and racist attitude that assimilation was best for everyone. The children were not allowed to use their own languages or to maintain their cultures. See Andrew Stobo Sniderman, *A Shameful Chapter in Our History*, VANCOUVER SUN, June 25, 2011, at C1 ("For more than 100 years, the Canadian government funded church-run schools to assimilate aboriginal children. . . . Over time, more than 150,000 children would be sent to residential



educating all Canadians about this sordid chapter in their national history would “be a positive step in forging a new relationship between Aboriginal peoples and other Canadians, a relationship based on the knowledge of our shared history, a respect for each other and a desire to move forward together with a renewed understanding that strong families, strong communities and vibrant cultures and traditions will contribute to a stronger Canada for all of us.”<sup>138</sup> The damage caused by the Indian Residential Schools System in Canada is incalculable, and could never be addressed via reparations alone.<sup>139</sup> A formal, public apology from the government for the nation’s racist past was the best place to begin to move into a non-racist future.

There is no reason that the same approach could not be successful in the United States based on this nation’s history of sex, race and class discrimination. The true value of the apology and the TRC in Canada may be that, in addition to providing a forum for survivors to be heard,<sup>140</sup> it has forced Canadians to begin the difficult conversation about their nation’s history. Here in the United States, we need to have a similar conversation, and we have much to discuss: the treatment of women, of Blacks, of Native Americans, immigrants, the poor, the disabled – so many of us have been left out of the mainstream. To say that our rights have been violated may be true, but it also simply allows the status quo to continue.<sup>141</sup> The first step on the road to recovery<sup>142</sup> may be acknowledgment of the problem

schools.”). Similar events transpired in the United States, for which no apology has ever been issued.

<sup>138</sup> Prime Minister of Canada, Official Apology, *supra* note 136.

<sup>139</sup> See, e.g., Joe Friesen, *The Ballad of Daniel Wolfe*, GLOBE AND MAIL, June 18, 2011, at F1. This special report on the life and death of a leader of Canada’s largest aboriginal gang illustrates the depth of harm that has resulted from the residential schools: “Richard and Daniel [whose mother was taken away from her parents and placed in a residential school at the age of five] were born into a family that suffered generations of pain as a result of residential schools. Their parents were addicted to alcohol and drugs. They had little supervision or care as children. Their home was violent. Daniel, as his mother acknowledges, almost certainly had fetal-alcohol-spectrum disorder, which impairs judgment and impulse control. The cost of what they started is almost incalculable.” No amount of money could undo the damage.

<sup>140</sup> See Andrew Stobo Sniderman, *Exposing Canada’s Most Shameful Story*, OTTAWA CITIZEN, May 24, 2011, at A4 (describing testimony before Canada’s TRC: “A survivor speaks into a microphone facing only the three commissioners and TRC banners that read ‘For the child taken, for the parent left behind.’ Some stories last a few minutes, others a few hours. The audience is arranged in a horseshoe behind the survivor, who is joined by a friend with a hand of comfort and tissues at the ready. When a voice cracks, and most do, the audience cannot see the tears, but they can hear them.”).

<sup>141</sup> There are limits inherent to any discussion that centers on “rights.” See Mutua, *supra* note 134, at 69 (“Except for largely cosmetic effects, there is little possibility that the particular conceptualization of rights in the new South Africa will alter the patterns of power, wealth, and privilege established under apartheid. Unfortunately, South Africa has fallen victim to all the pitfalls of rights discourse.”).

<sup>142</sup> Many 12 step recovery programs begin with admitting that there is a serious problem; such an admission allows the addict to “move from a crisis mode to a prevention mode.” See 12Step.org, The 12 Steps, <http://www.12step.org/the-12-steps/step-1.html> (last visited Nov. 17, 2011). By way of analogy, the U.S. could take a step to begin moving from the crisis of discrimination to preventing

rather than litigation based on rights violations.<sup>143</sup> There is no reason that an official apology should not be forthcoming.<sup>144</sup> The potential for healing is great, and the risk of anything else is nonexistent.<sup>145</sup>

TRCs, like any other non-binding method of attempting to resolve disputes, work only when there is candor and a relative balance of power between the parties at the table.<sup>146</sup> If women or African Americans, for example, were not yet considered equal under the law of the United States, a TRC would be both inappropriate and ineffective.<sup>147</sup> However, the need for laws ensuring equality for women and African Americans has been largely met.<sup>148</sup> The laws exist. When litigation is brought, sometimes those laws are enforced.<sup>149</sup> But this has not changed the attitudes and culture that allow ongoing inequality to be the daily reality for many women and African Americans in the U.S.<sup>150</sup>

Culture change happens slowly, and it often occurs most effectively via grass roots movements.<sup>151</sup> But when it comes to women's equality in this

discrimination.

<sup>143</sup> Litigation, obviously, takes place at any of a number of levels (local, state, and federal). Similarly, TRCs may be utilized at any of those levels. In Canada, the three-member TRC is a national entity; but in the U.S., municipalities have established TRCs at that level.

<sup>144</sup> An apology does not make us all "victims" if we avoid the rights discourse and the inclination to drift into identity politics at its worst. Instead, an apology is simply an official acknowledgement that the U.S. has a history of discrimination; that is reality.

<sup>145</sup> In other words, we have everything to gain and nothing to lose by initiating the conversation about this nation's history of discrimination.

<sup>146</sup> For example, federal law permits binding arbitration between employers and employees when the two possess equal bargaining power. See Randall Thomas, Erin O'Hara & Kenneth Martin, *Arbitration Clauses in CEO Employment Contracts: An Empirical and Theoretical Analysis*, 63 VAND. L. REV. 959, 967-68 (2010) (noting that "concerns of employer overreaching are much weaker for CEO employment contracts . . . than [for] workers on the lower rungs of the corporation," as CEOs are less likely to be forced to arbitrate employment disputes than ordinary workers because CEOs are more likely to have more bargaining power).

<sup>147</sup> In South Africa, amnesty from criminal prosecution was granted in order to obtain the testimony of perpetrators; the TRC was thus one part of the process rather than the only part of the process. In Canada, the TRC was established as part of the settlement of a lawsuit by survivors of the Residential Schools System, again demonstrating that the TRC is one piece of several that were designed to address the past and enable the country to move forward.

<sup>148</sup> Race and sex are both "protected classes" under U.S. Constitutional jurisprudence, and discrimination based on membership in a protected class is unconstitutional. Discrimination based on class, however, is not prohibited: being poor does not come with the legal advantage of being a member of a protected class.

<sup>149</sup> See Liu, *supra* note 127, at 79 (noting that during the presidency of George W. Bush, the Department of Justice brought more employment discrimination claims on behalf of Hispanics than African Americans).

<sup>150</sup> Again, inequality stems from discrimination against and distrust of those who are perceived as "different." In this country, that covers a broad spectrum of people.

<sup>151</sup> For example, attitudes about drunk driving changed in the U.S. largely as a result of the grassroots organization Mothers Against Drunk Driving rather than simply as a result of more harsh penalties for the crime of driving under the influence. See John M. Breen, *Modesty and Moralism: Justice, Prudence, and Abortion: A Reply to Skeel & Stuntz*, 31 HARV. J.L. & PUB. POL'Y 219, 299-304 (2008) (describing the "complex interaction of law and culture" in bringing about the change in attitude

country, culture change may have become stalled. The laws were passed, attitudes began to change, paychecks began to equalize.<sup>152</sup> And then the momentum stopped. No written law by itself, whether local, state, federal, or international, can restart that movement. But a TRC would set the stage for real change, and might give attitudes in this country a little extra push in the direction of real equality – not just for women, but for all human beings in the United States.<sup>153</sup>

#### IV. ARE “WOMEN’S RIGHTS” STILL RELEVANT?

Feminist legal theory has enhanced not just the intellectual conversation but the quality of life for women in the U.S., and one risk of adopting a non-adversarial model for addressing inequality in this country is that women’s organized efforts to achieve equality might be diluted if the focus shifts beyond sex to encompass race and class at a minimum. But that risk is one that feminist legal theorists and scholars can afford to take<sup>154</sup> because, as if litigation were not divisive enough, litigation that arises from claims of discrimination based on race, sex, age, religion, natural origin, physical disability, gender identity, sexual preference, or any other “identity”<sup>155</sup> serves to reinforce the differences between humans in the

toward drunk driving).

<sup>152</sup> For a discussion of the effects of legal cooptation see Piccard, *U.S. Ratification of CEDAW*, *supra* note 13, at 152.

<sup>153</sup> This sets an overwhelmingly large task because the entire history of this nation is steeped in inequality. See HOWARD ZINN, *A PEOPLE’S HISTORY OF THE UNITED STATES* 685 (1980) (Professor Zinn wrote the history of this nation from the perspective of those whose voices are traditionally not heard. He noted our national reluctance to acknowledge the reality of this nation’s origins: “From first grade to graduate school, I was given no inkling that the landing of Christopher Columbus in the New World initiated a genocide, in which the indigenous population of Hispaniola was annihilated. Or that this was just the first stage of what was presented as a benign expansion of the new nation (Louisiana ‘Purchase,’ Florida ‘Purchase,’ Mexican ‘Cession’), but which involved the violent expulsion of Indians, accompanied by unspeakable atrocities, from every square mile of the continent, until there was nothing to do with them but herd them into reservations.” It would be folly to ignore this history or to imagine that its effects do not continue to shape our national culture).

<sup>154</sup> See, e.g., Hernandez-Truyol, *supra* note 5, at 135 (“The human rights framework is of great utility in a feminist liberation project because it helps move the discourse beyond a comparativistic sameness or difference approach to embrace nonessentialism. It goes beyond the narrow parameters of a legal equality paradigm rooted in sameness, and moves the discourse towards a full personhood perspective.”).

<sup>155</sup> Identity politics has been defined as “forging a movement, developing a perspective, and focusing one’s intellectual inquiry and social justice quest around a category of identity – woman, Latina, gay, working class. The critics charge that this . . . constitutes reactionary politics, because an individual’s quest for social status is necessarily at odds with a universal quest for social justice. In other words, ‘I’m Black and I’m proud’ will not take you all the way down the road marked ‘freedom and justice for all.’” Mari J. Matsuda, *Who is Excellent?*, 1 SEATTLE J. FOR SOC. JUST. 29, 37 (2002). Professor Matsuda ultimately disagrees with the criticisms of identity politics, for many good reasons: “Some sense of a group of kindred spirits engaged in collective action is the historical precursor of progressive politics. . . . It is only a problem if the group is hard-edged, static, exclusionary, and hell-

U.S.<sup>156</sup> This perpetuation of separateness, or otherness, lies at the opposite end of the identity spectrum from the concept of intersectionality.<sup>157</sup> Certainly women experience the world differently than men, just as blacks experience the world differently from whites, the poor experience it differently from the wealthy, gays differently from straights, etc. None of that is in any way minimized or trivialized here. The suggestion is simply that human beings in need of equality are more similar than they are distinguishable from each other, regardless of their sex, age, race, religion, national origin, political opinion, or any of the many other labels by which we all self-identify.<sup>158</sup> Identity is good; identity politics? Not so much. Women are stronger when we stand with, rather than apart from, Blacks, Latina/os, and the poor.<sup>159</sup>

Women will not move toward equality by reinforcing their separateness from other identity groups within this country. Domestic enforcement of the ICCPR might be preferable to domestic enforcement of a Women's

bent on reconfiguring hierarchy." *Id.* at 39. I'm afraid that feminist legal theory can be, at times, hard-edged, static, exclusionary, and hell-bent on reconfiguring hierarchy. Some might see that as a good thing rather than a bad one.

<sup>156</sup> Concerns about "essentialism" are not new. *See, e.g.,* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990). Professor Harris defines gender essentialism as, "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience. The result of . . . gender essentialism . . . is not only that some voices are silenced in order to privilege others (for this is an inevitable result of categorization, which is necessary both for human communication and political movement), but that the voices that are silenced turn out to be the same voices silenced by the mainstream legal voice of 'We the People' – among them, the voices of black women." *Id.*

<sup>157</sup> I am not unmindful of many scholars' well-placed concerns about essentialism being used as a substitute for identity, shifting the focus from the group to the individual and dissolving any chance of solidarity among group members. *See, e.g.,* Catharine A. MacKinnon's, *Keeping It Real: On Anti-"Essentialism,"* in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 75 (Francisco Valdes et al. eds., 2002). I do not propose that identity itself is counter-productive in the ongoing struggle to make equality a reality, but only that litigation based on identity is pointless and perhaps even destructive. It is intersectionality, rather than essentialism, that lies at the heart of my proposal. As Professor MacKinnon wrote elsewhere: "Knowing that gender hierarchy socially exists is what impels [Justice Ginsburg's] gender neutrality as a legal solution, whether or not that understanding has impelled the Court's embrace of it. The judgment that neutrality can be an effective strategy for eliminating inferiority can be debated. But there is no question that it is imposed inferiority, subordination in substance, that creates the need for it. This is what we are here to eliminate." MacKinnon, *A Love Letter to Ruth Bader Ginsburg*, *supra* note 11, at 183.

<sup>158</sup> Categorizing people is surely unavoidable, as Professor Angela Harris has noted: "My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and 'frozen' categories are the norm." Harris, *supra* note 156, at 586. All of this supports the notion that identity politics may simply be another way of enabling the status quo to continue, which is not the way to achieve meaningful social change.

<sup>159</sup> Note, however, that there are times when "strategic essentialism" can and should be employed. *See* Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37, 58-59 (2011) ("[T]here is value in a certain level of 'strategic essentialism,' whereby we pragmatically deploy social categories to overcome subordination predicated on those very social categories. . . . Strategic essentialism does not provide a specific roadmap for how to use a category about which we are ultimately critical, but it does important work in suggesting the possibility of doing so.").

Convention, or even enforcement of the Convention to End All Forms of Racial Discrimination, because the ICCPR provides universal, rather than identity-specific, guarantees of equality.<sup>160</sup> But even enforcement of the ICCPR cannot address the root causes of prejudice and discrimination in our country. Feminist legal scholars in particular might put their energy more productively into some thoughtful approach to addressing the attitudes that make discrimination acceptable in this country, rather than into pressing for U.S. ratification of CEDAW.<sup>161</sup> On a broader scale, all human rights advocates in the U.S. who seek to domestically enforce the ICCPR might consider the possibility that enforcement of this Convention, although it would eliminate the need to resort to identity politics in achieving social change, would be limited by its reliance on the rhetoric of rights and responsibilities and on our adversarial justice system.

Focusing on what makes us different rather than what makes us the same can be taken to extremes.<sup>162</sup> For example, Professor Catherine MacKinnon has taken the position that even the terrorist attacks on the United States on September 11, 2001 are best “[v]iewed through a “gendered lens.”<sup>163</sup> She acknowledges that the women victims of the attacks were people that day, and that “they were vaporized without regard to sex.”<sup>164</sup> But Professor MacKinnon emphasizes that the number of people killed by the male terrorists on September 11<sup>th</sup> is roughly the same as “the number of *women* who die at the hands of men every year in just one country, the same one in

<sup>160</sup> Enforcement of the ICCPR might be preferable only because of the justiciable/non-justiciable dichotomy between civil and political rights on the one hand, and economic, social, cultural, or racial rights on the other.

<sup>161</sup> Feminist legal theory is not without its critics, some of whom make the valid point that the feminist movement itself silences any voices that do not purport to speak from the “women’s” perspective: “Since the beginning of the feminist movement in the United States, black women have been arguing that their experience calls into question the notion of a unitary ‘women’s experience.’” Harris, *supra* note 156, at 586. Harris quotes Sojourner Truth’s 1852 address to the women’s rights convention in Akron, Ohio: “That man over there says women need to be helped into carriages, and lifted over ditches, and to have the best place everywhere. Nobody ever helps me into carriages, or over mud-puddles, or gives me any best place! And ain’t I a woman? Look at me!” *Id.* at 586, n.19. Much has been written about racism in the women’s suffrage movement. It’s hard to see that much has changed since 1851 if we are still talking about “women’s rights” instead of humans’ rights.

<sup>162</sup> For an excellent example of one scholar’s efforts to avoid just this, see Harris, *supra* note 156, at 586 n.20: “I use ‘black’ rather than ‘African-American’ because some people of color who do not have African heritage and/or are not Americans nevertheless identify themselves as black, and in this essay I am more interested in stressing issues of culture than of nationality or genetics. I use ‘black’ rather than ‘Black’ because it is my contention . . . that race and gender issues are inextricably intertwined, and to capitalize ‘Black’ and not ‘Woman’ would imply a privileging of race with which I do not agree.” Every categorization may thus be seen as suspect, no matter about or by whom it is made.

<sup>163</sup> Catharine A. MacKinnon, *Women’s September 11<sup>th</sup>: Rethinking the International Law of Conflict*, 47 HARV. INT’L. L.J. 1, 3 (2006) [hereinafter MacKinnon, *Women’s September 11<sup>th</sup>*].

<sup>164</sup> *Id.*

which September 11<sup>th</sup> happened.”<sup>165</sup>

There can be no doubt that women would lead better lives if domestic violence were treated as a violation of the Geneva Conventions. However, so would the men who are the victims of violence by other men, or of violence by women for that matter.<sup>166</sup> Abused children would certainly benefit from being considered victims of torture, and the violence inflicted on child victims certainly looks (and undoubtedly feels) like a war crime.<sup>167</sup> Poor people who sleep in city parks and depend on charity for their inadequate daily food would also benefit if deprivation of housing, healthcare, and nutrition were viewed as torture under the Geneva Conventions. The point is that every human being who is the victim of violence or discrimination deserves the same protections. Women are not the only ones in need of protection. Racial minorities and poor people (among others) are singled out for violence based on discrimination every day in the United States. If there is any logic to singling out any one of these groups for protections while ignoring the violence done to the others, it is beyond my comprehension.<sup>168</sup>

The idea that identity politics might undermine the struggle for equality is a controversial one for feminist scholars.<sup>169</sup> It was not so long ago that

<sup>165</sup> *Id.* at 4 (emphasis in original). Professor MacKinnon cites the FBI's crime statistics for 2002 and 2003, according to which over 3000 women died in each year due to violence perpetrated by men; the number killed in the September 11 attacks is estimated at between 2800 and 3000. *Id.* at 4, n.12. Her larger point is that the violence inflicted on women daily would be prohibited by the Geneva Conventions if it occurred during war, but because it is a daily, common occurrence that takes place with or without the existence of any armed conflict, the Geneva Conventions do not protect the women who are victimized: “Realized in what is called peacetime, Common Article 3 would transform the lives of women everywhere. But you need a war for it to apply.” *Id.* at 8-9.

<sup>166</sup> Many men in the U.S. are rape victims. See The Nat'l Ctr. for Victims of Crime, *Male Rape*, available at <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32361>. Rape is generally recognized as a crime of aggression rather than as a crime related in any way to sexual desire or sexual gratification, which means that the sex of the victim is as irrelevant as the sex of the perpetrator. See *id.*, quoting NICHOLAS GROTH, *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER* (1979), “all sexual assault is an act of aggression, regardless of the gender or age of the victim or the assailant.”

<sup>167</sup> “The World Health Organization (WHO) estimates that 40 million children below the age of 15 suffer from abuse and neglect, and require health and social care.” UNICEF, *Violence Against Children*, available at <http://www.unicef.org/protection/violence.html>. UNICEF notes that much violence against children goes unreported because the victim “may feel ashamed or guilty, believing that the violence was deserved. This often leads the child to be unwilling to speak about it.” *Id.* This sounds very much like the classic battered wife (or woman) syndrome: “Caring for and counseling a battered woman often require[s] great patience because she is usually ambivalent about her situation and may be confused to the point of believing that she deserves the assaults she has suffered.” Medical-Dictionary.com, *Battered Woman Syndrome (BWS)*, available at <http://medical-dictionary.thefreedictionary.com/battered+woman+syndrome>.

<sup>168</sup> “[F]eminist essentialism paves the way for unconscious racism.” Harris, *supra* note 156, at 589. This is just one problem that is created by focusing on identity politics.

<sup>169</sup> See Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1264 n.33 (“Some articles have called for international criminal

women were chattel in the United States,<sup>170</sup> without any of the rights or privileges guaranteed to men under the U.S. Constitution.<sup>171</sup> It would be folly to abandon or underestimate the progress for which the feminist movement is responsible.<sup>172</sup> Feminist history is a field unto itself, and one that deeply deserves the attention devoted to it.<sup>173</sup> The gains that women have achieved must be constantly acknowledged and celebrated.<sup>174</sup>

law to address particular problems such as . . . sex trafficking,” but none of these proposals have “gained traction in mainstream international criminal law scholarship, much less in practice.”); see also Matsuda, *supra* note 155, at 39 (“You can’t have a movement for social change without having a movement for social change.”).

<sup>170</sup> This fact has of course long been a part of feminists’ approach to equality: “To be a man’s other is to be his thing.” Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. WOMEN CULTURE & SOC’Y 3 (1982), reprinted in THE CANON OF AMERICAN LEGAL THOUGHT 847, 866 (David Kennedy & William W. Fisher III eds., 2006) (emphasis in original).

<sup>171</sup> Of course, the same could certainly be said about blacks in the United States, and black men obtained suffrage prior to white women. Native Americans, immigrants and children all have historically lacked rights in the U.S.

<sup>172</sup> Women under a certain age may take this progress for granted, but it is crucial that we all remember the dramatic strides that were made in the U.S. over the past fifty years, beginning, perhaps, with the widespread availability of the birth control pill in the 1960’s, and progressing all the way through Hillary Rodham Clinton’s run for the Democratic Party’s presidential nomination in 2008. See, e.g., Michelle S. Simon, *Women and the Law: How Far We’ve Come and Where We Need to Go*, 29 PACE L. REV. 223, 223 (2008) (“How far have we come? Very far. How far do we need to go? Still very far.”). If there is any sense of complacency, or any doubt that women still have a very long way to go, see D. Wendy Greene, *Black Women Can’t Have Blonde Hair . . . in the Workplace*, 14 J. GENDER RACE & JUST. 405, 408 (2011) (“[I]t is difficult to imagine that an employer would prohibit and could lawfully bar Black women from wearing blonde hair in the twenty-first century. However, these cases illustrate that modern employers have exacted a ‘no blonde hair in the workplace’ ban that’s singularly applied to Black women, and courts have ruled disparately regarding the legality of this proscription.”). This illustrates intersectionality as opposed to essentialism: the workers involved in these discrimination cases are black women who have chosen to color their hair blonde.

<sup>173</sup> See, e.g., ESTELLE B. FREEDMAN, NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN (2003) (tracing the origin of women’s movements and identifying the roots of the terminology used over the centuries to describe women’s struggle for political, civil, economic, social, and cultural equality). Interestingly, Professor Freedman notes that over time, women have emphasized their differences from men in tandem with their right to equality with men, referring to “the two competing strains of equality and difference.” *Id.* at 5. It is also worth noting that many, if not most, elite colleges and universities in the United States today offer majors in areas such as Gender Studies, which would not have been acknowledged as a legitimate field of study even thirty years ago. Harvard, for example, offers a major in the Study of Women, Gender, and Sexuality. See Harvard.edu, Academic Experience, available at <http://www.harvard.edu/academic-experience> (last visited Feb. 6, 2012). Yale offers a major in Women’s, Gender, & Sexuality Studies. See Yale.edu, Academic Programs: Departments and Programs, available at <http://yale.edu/departments/index.html> (last visited Feb. 6, 2012). And Williams College (currently the top-ranked liberal arts college in the nation) offers a major in Women’s, Gender, and Sexuality Studies. See Williams.edu, Departments & Programs, available at <http://www.williams.edu/depts-programs> (last visited Feb. 6, 2012). All of this is to say that history should never be underestimated or ignored, and that progress has been slow and steady. I am simply suggesting that once history has been studied, it may be time to turn toward the future.

<sup>174</sup> I am living proof of the power of feminism. My grandmother, Jeannette Ridlon Piccard, was an early women’s rights pioneer in fields as diverse as aeronautical engineering and the Episcopal priesthood (you can Google her). My mother, Elizabeth Koalska Piccard, is a radical left-wing feminist whose influence reached hundreds of students during her decades of teaching social work at Florida State University. My own children, Elizabeth, Mary, and Paul Piccard Reischmann, demonstrate every day of their lives that gender expectations are not limits on how they should live. I recognize, however, that ours is not a typical American family.

However, the way forward is not found solely by looking backward.<sup>175</sup> If equality is still women's goal, and it should be, there may be some additional things with which we ought to concern ourselves besides just our sex or gender. This is not to say that we should abandon notions of feminism, but rather that we would benefit from expanding the gendered lens to encompass class and race, in addition to sex. The world seems constantly on the verge of chaos in the 21<sup>st</sup> century;<sup>176</sup> if the future of the human race is in question, women, as Professor MacKinnon observed of September 11<sup>th</sup>, will be equal members of that race.<sup>177</sup> What difference will it make at that point that some humans perish with female sex organs while others die with male organs?<sup>178</sup> Worrying about sexual equality will be a luxury if the world runs out of oil in fifty years and no affordable alternative has been produced.<sup>179</sup>

Women are not just women at any time. For example, as the notion of intersectionality was developed by Professor Kimberle Crenshaw, "discrimination claims brought by Black women because of their unique status as Black women failed because courts viewed their experience along a 'single-axis analysis that distorts' the multidimensionality of Black women's experiences at the intersection of their race, gender, and class."<sup>180</sup> Legal feminists in the United States recognize now that sex and gender, or even gender and race, are not the only ways in which we define ourselves: "Beginning . . . in the 1990s . . . [a]ntiessentialism emerged as a robust working rubric as divisions within legal feminism developed over race and other axes of identity. . . . Today, masculinity, sexuality, and class are as

<sup>175</sup> See Nancy Fraser, *Feminism, Capitalism and the Cunning of History*, 56 NEW LEFT REV. 97, 97 (2009) ("Looking back at nearly forty years of feminist activism, I want to venture an assessment of the movement's overall trajectory and historical significance. In looking back, however, I hope also to help us look forward.").

<sup>176</sup> For an interesting look at the many unanswerable questions facing humanity right now, see JACQUES ATTALI, *A BRIEF HISTORY OF THE FUTURE: A BRAVE AND CONTROVERSIAL LOOK AT THE TWENTY-FIRST CENTURY* (2009). In the forward, the author lists a few questions, including: "Will poverty and inequalities in wealthy countries become the wellspring for new violence? . . . Will the American credit crisis plummet the world into another great depression? . . . Will the climate one day be so degraded that life on earth becomes impossible? . . . Will new forms of sexual relations undermine morality?" *Id.* at xi–xii. The title of the book does include the word "controversial."

<sup>177</sup> See MacKinnon, *Women's September 11<sup>th</sup>*, *supra* note 163, at 3 ("[T]hey were vaporized without regard to sex.").

<sup>178</sup> Again, this thesis runs the risk of being misunderstood as unconcerned with identity. Thus, it bears reemphasis that it is not the identity that is problematic, but the identity politics.

<sup>179</sup> See ATTALI, *supra* note 176, at xii.

<sup>180</sup> Greene, *supra* note 172, at 411 (quoting Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989)). Professor Crenshaw's definition of intersectionality calls for viewing the person as herself, rather than as a sum of the identities through which she may have been the victim of discrimination: Black women should be seen as "Black women – not the sum of race and sex discrimination, but as Black women." *Id.*



important as gender and race in legal feminist analysis.”<sup>181</sup> If women are going to re-think equality, we should do so as broadly as possible: Feminism, indeed, for everyone.<sup>182</sup>

Feminism’s Marxist origins cannot be ignored in any analysis of women rethinking equality.<sup>183</sup> Take, for example, the basic concept of workers’ rights.<sup>184</sup> “Marxist-socialist inspired feminism developed as a response to radical feminism in the 1960s. Radical feminists had concluded that Marxism had failed as a theory of oppression because it did not account for the origins or dynamics of sex oppression.”<sup>185</sup> Clearly, some early feminists in the U.S. viewed feminism as a political, social or economic theory rather than as a purely legal one, recognizing that while identity is important, not every aspect of identity lends itself to resolution or disposition in the legal realm. Marxist-socialism certainly covers more

<sup>181</sup> Laura T. Kessler, *Feminism for Everyone*, 34 SEATTLE U. L. REV. 679, 680 (2011) (footnotes omitted). Professor Kessler’s essay analyzes Joan Williams’s most recent book, “Reshaping the Work-Family Debate: Why Men and Class Matter.” Professor Williams has devoted her career to analyzing ways of resolving the family/work conflict in the United States, and has arrived at a point where her emphasis is no longer on gender and race alone, but actually on masculinity and class. This is a classic socialist position because workers are workers, regardless of their sex, color or class.

<sup>182</sup> See *id.* at 679.

<sup>183</sup> For example, feminist thought has been captured at various times as a “manifesto” and even as a “mamafesta.” See Barbara Johnson, *The Postmodern in Feminism*, 105 HARV. L. REV. 1076, 1076 (1992). Professor Johnson further cites both Mary Joe Frugg, *A Postmodern Feminist Legal Manifesto*, 105 HARV. L. REV. 1045 (1992), and DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW 207 (1991). “Feminists generally agree – it should go without saying – that women suffer in ways which men do not, and that the gender-specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture. Just as women’s work is not recognized or compensated by the market culture, women’s injuries are often not recognized or compensated as injuries by the legal culture. The dismissal of women’s gender-specific suffering comes in various forms, but the outcome is always the same: women’s suffering for one reason or another is outside the scope of legal redress.” Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN’S L.J. 149, 150 (2000). I cite these statements as demonstrations of identity politics taken to extremes. Their very tone seems dated given the current state of the world. Certainly women suffer in ways that men do not, but is the opposite not also true? And does every “suffering” need to be redressed in the legal system? This is where the notions of feminist legal theory of even a generation ago seem to be relics of another time; again, focusing on women as women alone seems a luxury that we cannot afford in the face of the economic crisis of 2008 and the global turmoil with which we are now faced on a daily basis.

<sup>184</sup> The notion of workers as entities with rights was introduced by Karl Marx in 1870. Much has been written about what workers’ rights mean and where they come from, but one particularly interesting account of the Catholic Church’s position on workers’ rights can be found in John M. Facciola, *Bruce Springsteen and the Remnants of a Catholic Boyhood*, 14 WIDENER L.J. 923, 929-30 (2005) (“[T]he Church finds the source of these rights as an effectuation of Gospel values and commands as to the relationship between the rich and the poor. At a time witnessing the relationship being characterized in Europe in Marxian, collective terms, the Church premised the workers’ rights on their inherent dignity and refused to see them as cogs in a self-defining, self-perpetuating economic machine.”).

<sup>185</sup> Kessler, *supra* note 181, at 689 n.71. Professor Kessler notes that “[m]any feminists . . . did not wish to separate from Marxism completely. They felt that reforming capitalist institutions was equally as important as eliminating sex-based oppression. And so a strand often referred to as Marxist-socialist feminism developed as an effort to synthesize feminism and Marxism into a viable theory of women’s oppression.” *Id.*

ground than feminist legal theory,<sup>186</sup> and it has the potential to uproot discrimination rather than to simply punish it in an adversarial legal setting. Perhaps if feminists returned to their Marxist-socialist roots, and really looked at ways to restructure the U.S. political and economic systems,<sup>187</sup> some positive strides could be made toward equality. Again, if litigation alone were capable of curing inequality, the problem would have been resolved long ago.

Much has been written about the role of multiculturalism and economic distribution in connection with feminist legal theory. For example, Nancy Fraser observed many years ago that multiculturalism fuels "struggles of groups mobilized under banners of nationality, ethnicity, 'race', gender, and sexuality. . . . [G]roup identity supplants class interest as the chief medium of political mobilization. . . . And cultural recognition displaces socioeconomic redistribution as the remedy for injustice. . . ."<sup>188</sup> More recently, Professor Fraser has proposed that current trends in feminist thought may have actually facilitated the economic inequality that exists in this country today, observing that "the cultural changes jump-started by the second wave [of feminism], salutary in themselves, have served to legitimate a structural transformation of capitalist society that runs directly counter to feminist visions of a just society."<sup>189</sup> While many feminist

<sup>186</sup> Feminist legal theory has been defined as "feminist critiques of existing (masculine) jurisprudence . . . [.] examples of feminist deconstruction that uncover the male bias in the existing legal system . . . [.] [a]nd . . . feminist litigation that strives to restructure the existing system." Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191, 194-95 (1988-1990). Thus, feminist legal theory, by definition, is a gendered perspective on the law. Marxist-socialism, by contrast, is at a minimum a political, economic, and social theory that by its own terms encompasses more than just the law, and certainly more than just the law from a feminist perspective. Marx described socialism as the stage between capitalism and communism.

<sup>187</sup> See JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 1-2 (2010) ("To match today's workplace to today's workforce, we need both public supports (subsidized child care, parental leave financed at a national level, national health insurance) and workers' rights (mandated vacation time, proportional pay for part-time work, and the right to request a flexible schedule)."). It should not matter whether the worker is a man or a woman, black or white, Latino or Asian, gay or straight. Human workers, rather than simply women workers, have rights.

<sup>188</sup> Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 NEW LEFT REV. 68, 68 (1995). See also Iris Marion Young, *Unruly Categories: A Critique of Nancy Fraser's Dual Systems Theory*, 222 NEW LEFT REV. 147, 147-48 (1997) ("Certain recent political theories of multiculturalism and nationalism do indeed highlight respect for distinct cultural values as primary questions of justice, and many seem to ignore questions of the distribution of wealth and resources and the organization of labour.").

<sup>189</sup> Fraser, *supra* note 175, at 99. Further, Professor Fraser points out that second-wave feminism worked when it "wove together . . . three analytically distinct dimensions of gender injustice: economic, cultural and political. . . . In the ensuing decades, however, the three dimensions of injustice became separated, both from one another and from the critique of capitalism." *Id.* It seems that women's focus on sex rather than class could be just as damaging as white women who ignore race. "Second wave" feminism defines the period of time in the 1960s and 70s when feminists joined the general culture of change around the world and "joined their New Left and anti-imperialist counterparts in challenging the economism, the etatism, and (to a lesser degree) the Westphalianism of state-organized capitalism,

scholars would disagree with Professor Fraser, as did Iris Marion Young in the 1990s,<sup>190</sup> the economic and political cultures in the U.S. are decidedly worse than they were a decade ago, so it seems even more imperative today for feminists to return to their root concerns about race and class in addition to sex.<sup>191</sup> The tension between economic justice and identity that was recognized in the 1990s persists to an even greater degree today as the gap between the rich and the poor continues to grow in the U.S.<sup>192</sup>

Every human has multiple identities to be acknowledged, honored, and celebrated:

I love my identities, which include feminist, critical race theorist, Okinawan, Sansei, Asian American, Third World, mother, leftist, and intellectual worker. From each of these places I am someone standing on the shoulder of ancestors who were reaching for a better world for themselves and those who follow. I don't see that claiming one identity diminishes another, and from digging deep into each I think I am better able to understand the human condition. Each has a political meaning for me . . . . I find much of my political knowledge about how to move the world comes from these identities: from the work I did from these positions, from the historical struggles others have engaged in from these positions, and most significantly from the intersections.<sup>193</sup>

The intersections enhance, rather than diminish, the rights of every human. They should be celebrated rather than stifled.

### CONCLUSION

If the United States is ever to progress beyond inequality, something more than law will be needed. Social change, cultural change, acceptance of international norms – these things will not be accomplished by litigation alone. The model of the Truth and Reconciliation Commission is

while also contesting the latter's androcentrism – and with it, the sexism of their comrades and allies. . . . Focusing not only on gender, but also on class, race, sexuality and nationality, they pioneered an 'intersectionist' alternative that is widely accepted today." *Id.* at 103.

<sup>190</sup> See generally Young, *supra* note 188, at 147. Professor Young does acknowledge that "[t]o the degree they exist, Fraser is right to be critical of tendencies for a politics of recognition to supplant concerns for economic justice," indicating that equality should cover more territory than just sex. *Id.* at 148.

<sup>191</sup> Fraser, *supra* note 175, at 103. If, as Professor Fraser states, intersectionality is widely accepted today, it is not clear why feminists continue to advocate for ratification of CEDAW.

<sup>192</sup> "[A]lthough distributive injustices are experienced by social collectivities defined by economic disadvantage (i.e., class), injustice ultimately results from the failure to recognize the equal moral worth of individuals." Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 GEO. MASON L. REV. 145, 146 (2000) (discussing Nancy Fraser's dichotomy between politics of recognition and of distribution).

<sup>193</sup> Matsuda, *supra* note 155, at 40.

appropriate and should be utilized at the local, state and national level to begin the difficult conversations about the past that are needed to free this country to move into its future. We have enough to worry about without hating each other, excluding each other, and putting our energies into maintaining the systems that enable the status quo to keep us down. Human rights are human rights. We all have them. We all need to respect them.

